SPONSORSHIP

APPEALS

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SPONSORSHIP APPEALS

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FOREWORD

In the various chapters of this Paper, we have endeavoured to address a few of the significant areas within the jurisdiction of the Immigration Appeal Division (IAD) in sponsorship appeals. Some of the grounds of refusal as well as other issues are included. We have attempted to capture the essence of these areas rather than treat them in depth. The Paper does not purport to be an exhaustive treatment of the subjects addressed.

Periodic updates of the Paper are planned. We welcome your comments on the Paper.

Explanatory Note: The Paper contains some references to the Immigration Manuals and Operations Memoranda of the Department of Citizenship and Immigration. These policy instruments do not bind the IAD. Their inclusion is solely for the purpose of providing background on the immigration process. They are not evidence of the process actually followed in a particular case.

1. INTRODUCTION

1.1. Who May Sponsor

A Canadian citizen or permanent resident 19 years of age or over and residing in Canada may sponsor an application for permanent residence made by a member of the family class.[1] A sponsor must give an undertaking of assistance on behalf of the sponsored relatives. Subject to certain exceptions[2], the sponsor must demonstrate the ability to fulfil the undertaking, primarily a financial means assessment. If the sponsor does not meet the requirements of the *Regulations* for sponsoring, the application for landing (permanent residence) may be refused.

1.2. Who May Be Sponsored

Members of the family class may file a sponsored application for landing.[3] They may include their dependants[4] in the application for landing. Members of the family class and accompanying dependants are eligible for immigrant visas provided the members of the family class and all dependants, whether accompanying or not, are admissible and otherwise meet the requirements of the *Immigration Act* and *Regulations*.[5] A visa officer may refuse an application for landing if members of the family class or dependants are inadmissible.

1.3. Jurisdiction of Immigration Appeal Division in Sponsorship Appeals

If the application for landing is refused, the sponsor must be informed of the reasons for the refusal.[6] There is a right of appeal to the Immigration Appeal Division (IAD) from a refusal of a sponsored application for landing made by a member of the family class.[7] Section 77(3) sets out the grounds of appeal: 1) any ground of appeal that involves a question of law, fact, or mixed law and fact; and 2) the ground that there exist compassionate or humanitarian considerations[8] that warrant the granting of special relief.

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[1] "Sponsor" is defined in the *Immigration Regulations, 1978*.

[2] See Chapter 1, Financial Refusals, for an explanation of these exemptions.

[3] Section 2(1) of the *Regulations* defines "member of the family class."

[4] As defined in section 2(1) of the *Regulations*.

[5] Section 6(1)(a) of the *Regulations*.

[6] See section 77(1) of the *Act* and the exception in section 77(2).

[7] There are some exceptions, however, set out in sections 77(3.01), (3.1) of the Act.

[8] Also loosely referred to as "humanitarian and compassionate considerations".

The IAD is a quasi-judicial tribunal and a court of record with the powers of a superior court as regards the matters set out in section 69.4(3) of the *Immigration Act*. It has sole and exclusive jurisdiction to hear and determine all questions of law and fact arising in relation to refusals of sponsored applications for landing,[9] including questions concerning its jurisdiction.[10]

Whether a particular applicant comes within the definition of "member of the family class" is a jurisdictional issue; a non-jurisdictional issue is whether the applicant is inadmissible under section 19(1) of the *Act*. If a ground of refusal involving a jurisdictional issue is upheld, the IAD cannot exercise its compassionate or humanitarian jurisdiction to grant special relief. To do so would expand the family class beyond its defined limits.[11] A non-jurisdictional ground, however, may be overcome with the granting of special relief.

A sponsorship appeal before the IAD is a hearing ***de novo*** in a broad sense.[12] The IAD is not bound by legal or technical rules of evidence and it may receive and base its decision on evidence considered necessary and credible or trustworthy.[13] As a general rule, the appeal is decided on the facts as they exist at the time of the hearing.[14]

The IAD may allow or dismiss a sponsorship appeal. It may allow in law or by granting special relief on compassionate or humanitarian grounds, or both. The IAD must give reasons for its decision.[15] If the IAD allows an appeal, the matter goes back for further processing and an assessment of whether the requirements of the *Immigration Act* and *Regulations*, other than those requirements upon which the decision of the IAD has been given, are met.[16]

The decision of the IAD may be "appealed," by way of judicial review, to the Federal Court Trial Division with leave of the Court.[17]

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[9] However, the Federal Court Trial Division has judicial review power respecting the decision of a visa officer (section 82.1(2) of the *Act* and ***Khakoo, Gulshan M. v. M.C.I.*** **(F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995.).** The applicant for landing (as opposed to the sponsor) has the right to seek judicial review.

[10] ***Sheriff, Sithi Zehra v. M.E.I.*** **(F.C.A., no. A-152-93), Strayer, Linden, McDonald, November 2, 1995.**

[11] ***Garcia, Elsa v. M.E.I.*** **(I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979.**

[12] ***Kahlon v. Canada (M.E.I.)*** **(1989), 7 Imm.L.R.(2d) 91 (F.C.A.).**

[13] Section 69.4 (3)(c) of the *Act*.

[14] ***Kahlon v. Canada (M.E.I.)*** **(1989), 7 Imm.L.R.(2d) 91 (F.C.A.).**

[15] Section 77(4) of the *Act*.

[16] See section 77(5) of the *Act*.

[17] Section 82.1(1) of the *Act*.

CASE LIST: INTRODUCTION

Garcia, Elsa v. M.E.I. (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979. .... I-2

Kahlon v. Canada (M.E.I.) (1989), 7 Imm.L.R.(2d) 91 (F.C.A.). I-2

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CHAPTER 1

2. FINANCIAL REFUSALS

1.1 INTRODUCTION

An undertaking is defined in the *Immigration Regulations, 1978* as:

(a) for the purposes of subparagraph 6(1)(b)(i),

(ii)[...]an undertaking in writing given to the Minister to make provision for the lodging, care and support of a member of the family class and the member's dependants for a period not exceeding ten years, as determined by an immigration officer[...].

Financial refusals are founded on section 6(1)(b)(ii) or (iii) of the *Immigration Regulations, 1978* and/or section 19(1)(b)[18] of the *Immigration Act.*

1.2 EXEMPTIONS FROM UNDERTAKING

A sponsor is sometimes exempted from the undertaking fulfilment obligation depending on whose application is being sponsored. These persons include: (i) the sponsor's spouse who does not have any accompanying dependants with issue; (ii) an accompanying dependant of the sponsor's spouse who at the time the sponsor gave the undertaking was under 19 and without issue; and (iii) the sponsor's dependent son or dependent daughter who at the time the sponsor gave the undertaking was under 19 and without issue.

For applicants who intend to reside in Quebec, separate rules apply. An immigration officer is not required to consider the question of default in a previous undertaking or of the ability to fulfil a present undertaking if the applicant intends to reside in Quebec. In addition, a visa officer shall not issue a visa to an applicant who intends to reside in Quebec unless the Minister of Cultural Communities and Immigration is of the opinion that the sponsor will be able to fulfil the undertaking, unless the applicant is a person with respect to whom the sponsor would otherwise be exempt from the undertaking requirements, namely, those persons described in (i), (ii) or (iii) of the preceding paragraph.[19]

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[18] Section 19(1)(b) of the *Immigration Act* reads:

19.(1) No person shall be granted admission who is a member of any of the following classes:

(b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support.

[19] *Immigration Regulations, 1978*, section 6(3.1), (3.2), (3.3).

1.3 UNDERTAKING REQUIREMENTS AND RELEVANT FACTORS TO BE CONSIDERED IN THE DETERMINATION

There are three requirements set out in section 6(1)(b) of the Regulations respecting the undertaking of the sponsor:

> *6.(1)(b) the sponsor*
>
> *(i) has given an undertaking,*
>
> *(ii) is not in default in respect of any obligations assumed by him under any other undertaking given by him with respect to any member of the family class or assisted relative, and*
>
> *(iii) will, in the opinion of an immigration officer, be able to fulfil the undertaking referred to in subparagraph (i).*

Section 6(1)(b)(iii) requires a sponsor to be able, in an immigration officer's opinion, to fulfil his or her undertaking. The duration of the undertaking is up to ten years.

With respect to section 6(1)(b)(iii), an immigration officer is required to take into account the low income cut-off figures (LICO) published by Statistics Canada.[20]

The low income cut-off figures are a rough guide to the financial ability of sponsors, but no more than that. They are not, considered in isolation, in any way determinative. A certain income level, whether it is above or below the low income cut-off figure, cannot fetter the immigration officer's discretion.[21]

The low income cut-off figure is not the sole consideration. Others factors to be taken into account when assessing the ability of a sponsor to fulfil the undertaking of assistance are[22]:

(a) home ownership and/or possession of other assets;

(b) the work history of the sponsor, stability of employment, prospects of advancement, seniority in an employing company;

(c) the ability of the applicants to establish themselves;

(d) the prospects for future employment for the applicants;

(e) the willingness of the sponsor and other close family members to assist the applicants;

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[20] *Immigration Regulations*, 1978, section 6(2).

[21] ***Mohammed, Sarwari Begum v. M.E.I.*** (IAB V84-6249), Anderson, Chambers, Howard, April 29, 1986.

[22] ***Mohammed, Sarwari Begum v. M.E.I.*** (IAB 84-6249), Anderson, Chambers, Howard, April 29, 1986; ***Johl, Baljinder Kaur v. M.E.I.*** (IAB 85-4006), Eglington, Arpin, Wright, January 26, 1987; ***Randhawa, Jasbir Singh v. M.E.I.*** (IAD V90-00554), Wlodyka, Chambers, Verma, November 30, 1990.

(f) whether the sponsor's skills are in an area of expanding or declining demand;

(g) the sponsor's ability to obtain other employment in case of lay-off or loss of employment;

(h) the sponsor's ability to fulfil his or her financial commitments during the complete term of the undertaking;

(i) other sources of income, for example, interest payments, rental income, interest income.

The appeal may be allowed in law although a sponsor is unable to meet the low income cut-off figure because other factors may be taken into account in determining ability to fulfil the undertaking. An offer of low-cost accommodation by the sponsor's uncle, the guarantees of financial assistance by uncles and aunts and a common-law husband may be taken into account.[23] Whereas accommodation for the immigrants may be considered as a factor, lack of accommodation in itself should not be a criterion used to dismiss the appeal.[24]

The assessment is to be made on the evidence existing at the time of the hearing, since it is a *de novo* hearing in the broad sense before the Appeal Division.[25]

The Appeal Division should look not only at the future projections of the sponsor's family income, but at their actual income over the past few years in assessing their ability to continue to meet the appropriate low income cut-off level.[26] The proper approach is to consider the sponsor's income on a calendar-year basis.[27] A drop in income is not necessarily fatal where there is an overall trend of employability and a reasonable explanation for the dip in income.[28]

Where the immigration officer strictly applied the LICO, failed to take into consideration other factors and did not include income from all sources in determining the family income, the refusal was held invalid.[29] In a more recent case, however, because the hearing is a *de novo* hearing in the broad sense, the Appeal Division was of the view (in obiter) that, had it not been satisfied that the sponsor was able to fulfil her undertaking, it would have dismissed the appeal rather than allowing on the basis that the officer had considered only the LICO. However, the Appeal Division was not prepared to make a finding that only the LICO had been considered. The Appeal Division did, moreover, state that an immigration officer would be remiss in his duty if he only considered the LICO and the Appeal Division noted that the IMM 1283 does provide an opportunity to indicate ownership of a home, and plans and arrangements for the reception and support of the applicants, although it provides little guidance or space to provide the information.[30]

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[23] ***Ramos, Leticia Tecson v. M.E.I.*** **(IAB V83-6512), Anderson, Chambers, Tisshaw, May 8, 1985.**

[24] ***Cadiz, Mamerto Frilles v. M.E.I.*** **(IAB 84-4019), Petryshyn, Hlady, Voorhees, October 15, 1985.**

[25] ***Kahlon v. Canada (M.E.I.)*** **(1989), 7 Imm.L.R.(2d) 91 (F.C.A.).**

[26] ***Gill, Resham Singh v. M.E.I.*** **(IAD V93-02223), Clark, December 8, 1994.**

[27] ***Sekhon, Jaswinder Kaur v. M.C.I.*** **(IAD V93-01781), Ho, June 12, 1995.**

[28] ***Brar, Gurcharan Singh v. M.E.I.*** **(IAD V93-000593), Wlodyka, November 23, 1993.**

[29] ***Mohammed, Malo v. IAB (85-9394),*** **Arkin, Teitelbaum, Ariemma, November 28, 1986.**

[note this decision predates ***Kahlon v. M.E.I. (1989),*** **7 Imm.L.R.(2d) 91 (F.C.A.)** and may no longer be good law]

1.4 WHAT INCOME MAY/MAY NOT BE CONSIDERED FOR COMPARISON AGAINST LICO

1.4.1 General

The form used to complete the sponsor's financial evaluation is the IMM 1283, Financial Evaluation. The debts (exceeding $1080) are to be subtracted from family income on the Financial Evaluation to obtain the income figure to be applied against the LICO.[31]

Essentially, if the income is of a stable or continuing nature, it may be included as income.[32] It is gross salary that is considered.[33] However, it is the net rental income which is to be taken into account. Further, the Board may consider rental income, although the sponsor would cease receiving the income once the applicants had taken up residence in the rented premises, as it is a positive factor in the family's settlement.[34] Bank savings are not to be considered in determining whether a sponsor's income meets the LICO, however, the estimated yearly interest on savings may be included.[35] Monthly remittances to sponsored family members abroad are not a debit factor as payments would cease if the family were allowed to come to Canada.[36]

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[30] ***Gosal, Jasvir Kaur v. M.E.I.*** **(IAD V93-02361), Ho, July 12, 1994.**

[31] The following is an extract from ***Processing Undertakings in Canada*** published as Manual Chapter IP 1 by Immigration Canada, 08-95 (at page 8):

> The officer [...] must calculate the total income available from the information supplied by the client. If the client or spouse is self-employed or is receiving income from rental properties, the net figure as opposed to the gross figure should be considered and must be supported by a financial statement prepared by an accountant or a notice of assessment. Overtime may be considered if a letter from the employer indicates it is of a constant duration or this income is supported by a T4. Tips are to be considered only when reported on the income tax return and supported by the notice of assessment. All income from Worker's Compensation (with the exception of payments for permanent disabilities), social assistance agencies, employment training programs and unemployment insurance are not to be considered.

[Note the Immigration Manuals do not bind the IAD. The IAD provides its own interpretations in its reasons for decision. The IAD has not confined itself to the considerations enumerated in the Manual nor has it confined itself to accepting only the type of evidence outlined in the Manual.]

[32] ***Waage, Oscar Barton v. M.E.I.*** **(IAB V81-6369), Loiselle, Glogowski, Tremblay, February 8, 1983.**

[33] ***Beaubrun, Marie Lourdes v. M.E.I.*** **(IAB 79-1114), Loiselle, Houle, Tremblay, March 17, 1980.**

[34] ***Kaur, Manjit v. M.E.I.*** **(IAB 84-9064), D. Davey, Tisshaw, Suppa, December 13, 1985.**

[35] ***Nazir, Mohamed A. v. M.E.I.*** **(IAB 84-9578), D. Davey, Suppa, Voorhees, March 25, 1986.**

There is some dispute as to whether or not Workers' Compensation Board payments should be included as income. In one case, because the source of income is not restricted by the legislation in any way, it was felt they should be included.[37] However, in another case, it was held that the payments were not taxable and were not stable or continuing and thus should not be included in the financial evaluation.[38]

Overtime is not to be included where it is not shown to be income which is of a stable or continuing nature. However, overtime was considered, not specifically in relation to the ability to satisfy the low income cut-off figure, but in relation to the ability to fulfil the undertaking generally where there was evidence that overtime would be available.[39]

Where seasonal employment is of a stable and continuing nature, it should be taken into account by the immigration officer in calculating the sponsor's income for purposes of comparison with the applicable LICO.[40]

Credible, corroborated evidence of income not declared for taxation purposes was considered by the Board for the purpose of assessing the ability of the sponsor to fulfil her undertaking.[41] However, where the sponsor did not report his self-employed income, his explanation for failure to report was unsatisfactory and there was no corroborative evidence on what his self-employed earnings were, the officer's failure to take account of this income was supported by the Appeal Division.[42]

Payments from federal sources for employment training which are not of a fixed or continuing nature are not included in family income.[43] Payments from provincial or municipal sources for welfare assistance, in this case, mother's allowance, are not to be considered part of family income.[44]

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[36] ***Abuan, Mary Ann Janet R. v. M.E.I.*** **(IAD V92-01508), Gillanders, May 21, 1993.**

[37] ***Mohammed, Sarwari Begum v. M.E.I.*** **(IAD V84-6249), Anderson, Chambers, Howard, April 29, 1986.**

[38] ***Rajput, Sarwan Kumar v. M.E.I.*** **(IAB V83-6694), Petryshyn, Hlady, Voorhees, September 16, 1985.**

[39] ***Kler, Balbir Kaur v. M.E.I.*** **(IAB 84-9534), Hlady, Benedetti, Teitelbaum, December 4, 1984;** ***Kaur, Manjit v. M.E.I.*** **(IAB 84-9064), D. Davey, Tisshaw, Suppa, December 13, 1985.**

[40] ***Mann, Kusum L. v. M.E.I.*** **(IAB 85-9258), Tisshaw, Townshend, Ariemma, October 15, 1986.**

[41] ***Heer, Sukhninder Kaur v. M.E.I.*** **(IAB V87-6200), Gillanders, Mawani, MacLeod, August 3, 1988.**

[42] ***Dhaliwal, Jagdish Singh v. M.E.I.*** **(IAB V86-6078), Wlodyka, June 10, 1987.**

[43] ***Peck, Lurline Rose v. M.E.I.*** **(IAB T82-9436), Davey, Suppa, Tisshaw, April 25, 1984.**

[44] ***Usha, Ramadhar v. M.E.I.*** **(IAD T93-00078), Ahara, June 23, 1993.**

1.4.2 Unemployment Insurance Benefits

Benefits received from unemployment insurance (UI) are to be included as income in the sponsor's financial evaluation. They are taxable benefits. They are not social or welfare benefits.[45]

In one case, the sponsor had collected more in UI benefits than she had contributed in premiums and income taxes. However, the most important factor was that the sponsor and her daughter had not established themselves successfully in Canada. They had both been unemployed for considerable periods of time. They had both been a drain on the unemployment insurance pool for a period of five years. They were a burden on other UIC contributors. It appeared that the applicants were destined for a similar future if they were allowed to immigrate. The Appeal Division dismissed the appeal.[46]

In another case, the sponsor and her husband had collected UI every year since 1989. The Minister argued that they had received more UI than they had paid out in income taxes and UI deductions. The Appeal Division did not believe that the merits of UI should be evaluated on the basis of whether an individual has contributed more in terms of taxes or deductions. The Appeal Division held that the drawing of UI should not be viewed as a stigma when the individual has a steady work history and demonstrates a strong work ethic. Here, both had a steady employment history and earned stable income and the panel was satisfied the sponsor would be able to fulfil her undertaking. The earlier decision in ***Bath***[47] was distinguished because the sponsor in ***Bath*** was unable to meet the LICO even though she had been receiving considerable UI.[48]

Similarly, where the sponsor's major source of income had been unemployment insurance benefits, but the combined family income of the sponsor and her husband had continued to increase substantially over the years, ***Bath*** was distinguished because the sponsor in that case had collected UI each year, her income was less than the LICO, she had received more in UI than she contributed in premiums and income tax and it was reasonable to conclude her mode of working would affect the UI premiums of other workers, and she had not established successfully in Canada. Here, the facts were different. The combined family income exceeded the LICO; the sponsor's medical condition necessitated her leaving her employment; and the sponsor would provide room and board to the applicants.[49]

Yet again, ***Bath*** was rejected, according to the panel, for its failure to differentiate between social assistance income and unemployment insurance income. The Appeal Division continued that it has been trite law since ***Khosa*** that UI benefits ought to be included in calculating the ability of a sponsor to fulfil an undertaking of assistance. While the prospect of long-term or frequent use of social assistance may indicate that a prospective immigrant to Canada could be expected to be a burden on Canada's social programs, this does not hold for UI income.[50]

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[45] *Khosa, Manjit Kaur v. M.E.I.* (IAB 82-6159), Loiselle, Falardeau-Ramsay, Tremblay, April 8, 1983; *Rai, Surjit Kaur v. M.E.I.* (IAB V84-6192), Chambers, Tisshaw, Anderson (dissenting), September 17, 1986.

[46] *Bath, Satwant Kaur v. M.E.I.* (IAD V91-01006), Wlodyka, April 29, 1992.

[47] *Bath, Satwant Kaur v. M.E.I.* (IAD V91-01006), Wlodyka, April 29, 1992.

[48] *Baring, Harwinder Kaur v. M.E.I.* (IAD V93-00614), Lam, Ho, Verma, August 10, 1994.

[49] *Grewal, Harpreet Kaur v. M.E.I.* (IAD V93-00587), Singh, Ho, Lam, August 5, 1994.

The Appeal Division stated as a general principle that one cannot reasonably conclude, without specific evidence on point, that a person who receives more in UI than he contributes in premiums and income taxes must necessarily be a drain on the UI system and a burden on other UI contributors. Since by its nature UI is an insurance scheme, UI premiums paid should be far less than benefits receivable. It is even less meaningful to compare the amount of UI received with the amount of income taxes paid. In considering UI, it is important to remember that UI is not welfare; it is an insurance scheme to which workers contribute. On the particular facts, the sponsor's husband had steady employment notwithstanding regular payment of UI to him, because his employer could not procure sufficient contracts to keep him working year round.[51]

1.5 WHOSE INCOME CAN BE INCLUDED

1.5.1 Meeting the LICO

Generally speaking, the Appeal Division has held that where an undertaking is co-signed by the sponsor and the sponsor's spouse, their joint family income may be considered. There is no reason why there cannot be joint sponsorship.[52] However, where the sincerity of the sponsor's husband's commitment to the applicants was in question, his income was not included.[53]

The Appeal Division takes a fact-oriented approach to the question of whether or not there could be a joint undertaking and joint appeal. In ***Braich***,[54] the evidence supported the conclusion that the spouses had filed a joint undertaking and jointly signed the notice of appeal from the refusal of their adopted son's application.

The Appeal Division has no jurisdiction to rule on the issue of whether or not the co-signing spouse is bound by the covenants sought to be created in the Undertaking. In reaching a finding that there was a joint sponsorship of the application of the adopted son as a condition precedent to allowing the co-sponsor to continue the appeal commenced by her deceased husband, the Appeal Division was not ruling that the co-sponsor either was or was not bound by the covenants. While agreeing with counsel for the

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[50] ***Gill, Resham Singh v. M.E.I.*** **(IAD V93-02223), Clark, December 8, 1994.**

[51] ***Gosal, Jasvir Kaur v. M.E.I.*** **(IAD V93-02361), Ho, July 12, 1994.**

[52] ***Sandhu, Gurcharan Singh et al. v. M.E.I.*** **(IAB T87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987.**

[53] ***Campbell, Carmen v. M.E.I.*** **(IAD T91-02166), Bell, Chu, Ahara, February 3, 1992.**

[54] ***Braich, Nirmal Singh (deceased) and Braich, Mohinder Kaur v. M.E.I.*** **(IAD V89-00893), Wlodyka, August 11, 1993.**

Minister that it was important that the covenants created under the Undertaking should be effective against a co-sponsor, the panel was not willing to penalize the co-sponsor because the Undertaking form was defective in ensuring that the covenants would in fact be binding upon her.[55]

Where the sponsor's husband had signed the Undertaking as sponsor and she had signed as spouse, and the husband had subsequently left for India and had ceased to reside in Canada, the Appeal Division found the sponsor to be a co-sponsor with a right of appeal from the refusal of her son's application. She was, in her own right, eligible to sponsor the applicant.[56]

Where the sponsor and her sister had signed the financial guarantee (Evaluation of Guarantor's Financial Circumstances), their combined income was considered in assessing ability to meet the LICO. The income of a third sister who had not signed the form was not considered under the LICO assessment, but was taken into account in considering the ability of the sponsor to meet the undertaking generally.[57] Where the sponsor's brother filed a statutory declaration at the hearing to the effect that he undertook to assume full financial responsibility for the applicants (his parents and sister) by providing them with all necessities including boarding, lodging, medical care, travel expenses, and anything else which they might need, the Appeal Division interpreted it as a broad statement of support and an offer of free lodging to the applicants. However, the Appeal Division could go no further because the sponsor had not presented detailed evidence of her brother's net worth or other specifics as to his financial resources in order to enable the panel to assess the brother's ability to assume financial responsibility for the applicants.[58]

The sponsor's uncles were held not legally entitled to co-sponsor the application of the sponsor's father, mother and siblings.[59] Nor was a sponsor's grandson entitled to be a co-sponsor.[60] However, in another case, the Appeal Division considered the father, his son and daughter to be co-sponsors of the application of another son and daughter of the father. Total settlement arrangements of the three co-sponsors in this case enabled the sponsor-father to meet the LICO.[61]

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[55] ***Sidhu, Jagjit Singh (deceased) and Sidhu, Surjit Kaur v. M.E.I.*** **(IAD V92-00644), Clark, Verma, Ho, May 11, 1994.**

[56] ***Takhtar, Manjit Kaur v. M.C.I.*** **(IAD V93-01116), Verma, December 14, 1994.**

[57] ***Abuan, Mary Ann Janet R. v. M.E.I.*** **(IAD V92-01508), Gillanders, May 21, 1993.**

[58] ***Sekhon, Jaswinder Kaur v. M.C.I.*** **(IAD V93-01781), Ho, June 12, 1995.**

[59] ***Brar, Gurcharan Singh v. M.E.I.*** **(IAD V93-00593), Wlodyka, November 23, 1993.**

[60] ***Bath, Satwant Kaur v. M.E.I.*** **(IAD V91-01006), Wlodyka, April 29, 1992.**

[61] ***Natividad, Quintin Pandac v. M.E.I.*** **(IAD V92-01200), Verma, January 6, 1994.** Note, by way of background, that Immigration Canada Manual Chapter IP 1, ***Processing Undertakings in Canada***, dated 08-95 describes the following under "co-sponsorships" (at page 9):

> The person who signs the undertaking is the only one legally responsible for it. However, the resources of a co-sponsor can be taken into consideration if he/she is eligible to sponsor the person in his/her own right.

In ***Seepall***[62], the Appeal Division held that the income of the sponsor's son should be included in the calculation of the LICO. The Minister sought judicial review on this very issue. The Court stated that the Appeal Division had relied on ***Johl***[63] and that it was clearly open to the Appeal Division to take into account the testimony of the son that he was willing, and would be able, to support the applicant. The Court continued:

> The decision in ***Johl*** supports the Board's finding that the income of [the son] should be taken into account and regarded as a relevant factor in assessing whether or not [the sponsor] would be able to fulfil her undertaking of assistance.[64] (emphasis added)

The Court seemed not to have distinguished between using the son's income to satisfy the LICO versus using the son's income to assist the sponsor in fulfilling the undertaking generally. The Court, however, did hold that the income should be taken into account in assessing whether or not the sponsor would be able to fulfill the undertaking.

Where a sponsor had submitted an undertaking in 1983, and his brother, in 1987, both of them for their mother and her dependants, the Board held that it could not consider the brother's undertaking conjunctively with the sponsor's sponsorship.[65]

1.5.2 Meeting the Undertaking Generally

Where a sponsor can satisfy the Board that with the support of other members of her family she will meet her undertaking, the appeal will be allowed in law. The income of these other family members is not included with the sponsor's income to enable her to meet the LICO.[66]

Although a sponsor's relatives may not be entitled to co-sponsor an undertaking, their offer of assistance can be a positive factor.[67] Similarly, while their offers of support are probably not legally

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> Therefore, siblings in Canada can pool their resources to sponsor parents or grandparents. Co-sponsors should photocopy and complete the financial evaluation form (IMM1283) and submit it with the sponsors. They should also provide a letter to the CPC [Case Processing Centre] advising of their intention to co-sponsor.

[Note: The Immigration Manuals are not binding on the IAD.]

[62] ***Seepall, Mavis Roslyn v. M.C.I.*** **(IAD T93-06999), Channan, November 9, 1994.**

[63] ***Johl, Baljinder Kaur v. M.E.I.*** **(IAB 85-4006), Eglington, Arpin, Wright, January 26, 1987.**

[64] ***M.C.I. v. Seepall, Mavis Roslyn*** **(F.C.T.D., no. IMM-4926-94), Jerome, November 24, 1995, at page 3.**

[65] ***Malik, Mohammad Amin v. M.E.I.*** **(IAB T85-9685), Chu, D. Davey, Ahara, September 9, 1987.**

[66] ***Villadiego, Elizabeth Arriola v. M.E.I.*** **(IAB 78-6173), Campbell, Weselak, Benedetti, March 30, 1979.**

[67] ***Brar, Gurcharan Singh v. M.E.I.*** **(IAD V93-00593), Wlodyka, November 23, 1993.**

binding, they may constitute evidence of an extended family network of emotional and financial support for the applicants.[68]

The financial support of another family member may be compared against the LICO for a family unit comprising the family member, their family, the sponsor and applicant(s) in order to determine the adequacy of the offer of support.[69]

A sponsor submitted into evidence an excerpt from the Immigration Manual indicating that sponsors who have insufficient personal income of their own may claim on Form IMM 1283 all eligible income from appropriate family members, who, in their own right, are eligible to submit a family class undertaking on behalf of the applicant, but, like the principal sponsor, are unable to meet the financial criteria on their own. The sponsor argued that, according to immigration policy, the Appeal Division must consider her brother's family as co-sponsors of their parents. The Appeal Division did not accept the argument, first, because policy directives are not enforceable as law and second, because the brother and his family had not signed the Undertaking of Assistance as co-sponsors of the applicants. Therefore, the consideration of the undertaking was limited to the sponsor and her family. However, the financial contributions of the sponsor's brother and his family could be considered generally.[70]

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[68] ***Gosal, Jasvir Kaur v. M.E.I.*** **(IAD V93-02361), Ho, July 12, 1994.**

[69] ***Sidhu, Jagjit Singh (deceased) and Sidhu, Surjit Kaur v. M.E.I.*** **(IAD V92-00644), Clark, Verma, Ho, May 11, 1994.**

[70] ***Gandham, Rehsam Kaur v. M.E.I.*** **(IAD V91-01666), MacLeod, Gillanders, Verma, March 3, 1993.** Compare ***Abuan, Mary Ann Janet R. v. M.E.I.*** **(IAD V92-01508), Gillanders, May 21, 1993,** where a sister of the sponsor had completed an IMM 1283 (Financial Evaluation): although not a co-sponsor in the true sense because she had not signed (given) an undertaking, completion of IMM 1283 allowed a pooling of financial resources for comparison against the LICO.

1.6 WHO IS INCLUDED IN THE FAMILY UNIT

The members of the sponsor's immediate family and any persons in respect of whom a previous undertaking was given and is still in effect are to be included in determining the size of the family unit for the purpose of applying the relevant low income cut-off figure.[71]

A common law spouse is not included in the family unit.[72]

In the ***Lall*** case, a former spouse in respect of whom a prior but subsisting undertaking had been given by the sponsor was included in the family unit, but not a current spouse without Canadian permanent resident status nor the sponsor's sister who was residing with her.[73] In a later case, ***Lall*** was distinguished and a former spouse was not included in the family unit although the subject of a prior subsisting undertaking because in ***Lall***, the issue was not argued but consented to by counsel and here, the evidence indicated that the previous spouse was not wholly or partially dependent on the sponsor at the time of refusal and it was thus unfair for the officer to have included her in calculating the size of the family unit.[74]

Two of the sponsor's sons were not included in the family unit although residing with the sponsor because they were not dependent on the sponsor for support; neither was their income included in computing the sponsor's ability to meet the low income cut-off figure. The Board referred to the definition of "family" in the *Immigration Act* which it found more applicable than the definition of "dependant" in the *Immigration Regulations, 1978*. The definition of "family" means the father and mother and any children who by reason of age or disability, are mainly dependent on the father or mother for support.[75]

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[71] ***Macaraig, Evangelina Cruz v. M.E.I.*** **(IAB 83-6415), Hlady, Petryshyn, Tremblay, December 18, 1984.** The Immigration Canada Manual, ***Processing Undertakings in Canada***, dated 08-95, includes the following members in calculating the size of the family unit for the purpose of applying the relevant low income cut-off figure (pages 7-8):

- the sponsor
- his/her spouse
- the sponsor's dependent children
- previously sponsored relatives who are still dependent on the sponsor
- any other relatives dependent on the sponsor or spouse for support
- relatives the sponsor is submitting the undertaking for, and
- other dependent children of the principal applicant who are not accompanying the applicant to Canada.

[Note: The Immigration Manuals are not binding on the IAD.]

[72] ***Ramos, Leticia Tecson v. M.E.I.*** **(IAB V83-6512), Anderson, Chambers, Tisshaw, May 8, 1985.**

[73] ***Lall, Khamahwattee v. M.E.I.*** **(IAB 84-9622), D. Davey, Glogowski, Suppa, July 11, 1985.**

[74] ***Dhaliwal, Jagdish Singh v. M.E.I.*** **(IAB V86-6078), Wlodyka, June 10, 1987.**

[75] ***Sangha, Parmjit Kaur v. M.E.I.*** **(IAB 84-6016), Voorhees, Howard, Anderson (dissenting), October 16, 1985.**

In determining the size of the family unit for the purposes of the low income cut-off figure, the Board included the sponsor's husband, who had signed the undertaking, as well as persons in respect of whom there was an outstanding undertaking previously given by the husband.[76] Whether a sponsor's spouse should be included in the family unit is a question of fact to be determined according to the circumstances of each case. Where two spouses maintained a commuter marriage and shared their family income and expenses, the Appeal Division was of the view that one must include the other spouse's income and expenses in order to make an accurate assessment of the sponsor's financial resources. The spouse had signed the sponsor's undertaking and financial evaluation.[77]

The assessment is made at the time of the hearing. Where one of the applicants had a new baby at the time of the hearing, the baby was included in calculating the size of the family unit.[78]

1.7 AREA OF RESIDENCE

The amount of the low income cut-off figure depends on the population of the area of residence.

Where it was a question of whether the City of Waterloo was to be considered a non-metropolitan city or a metropolitan area necessitating a higher income, the Board considered realty tax assessments indicating municipal and regional taxes were paid and therefore it was considered a metropolitan area.[79]

Where the sponsor and her husband resided in Surrey (Column B in the Area of Residence chart which is included in the record) but the applicants would reside in Quesnel (Column D), the range between Column B and D was considered ($34,343-$30,585).[80]

Where the sponsor was living in Delta, a suburb of Vancouver, the area of residence was Delta, not Vancouver or the Greater Vancouver Regional District, and the population was 100,000-499,999, not over 500,000. Either way, the LICO was met.[81] Similarly, where the sponsor was living in Surrey, B.C., the population of Surrey, not Vancouver, was used.[82]

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[76] ***Mavi, Jaswinder Kaur v. M.E.I.* (IAB 83-10054), Suppa, D. Davey, Glogowski, August 1, 1985.**

[77] ***Sekhon, Jaswinder Kaur v. M.C.I.* (IAD V93-01781), Ho, June 12, 1995.**

[78] ***Abuan, Mary Ann Janet R. v.* M.E.I. (IAD V92-01508), Gillanders, May 21, 1993.**

[79] ***Mavi, Jaswinder Kaur v. M.E.I.* (IAB T83-10054), Suppa, D. Davey, Glogowski, August 1, 1985.**

[80] ***Gosal, Jasvir Kaur v. M.E.I.* (IAD V93-02361), Ho, July 12, 1994.**

[81] ***Atwal, Bhupinder Singh v. M.E.I.* (IAD V93-01460), Durand, June 30, 1994.**

[82] ***Kooner, Parmjeet Kaur v. M.E.I.* (IAD V93-00508), Singh, June 28, 1994.** See also ***Sekhon, Jaswinder Kaur v. M.C.I.* (IAD V93-01781), Ho, June 12, 1995,** where the City of Surrey was chosen over the Greater Vancouver Regional District, Surrey being a distinct city and there being no evidence the two municipalities were associated for any reason related to the cost of living.

1.8 SECTION 19(1)(b) OF THE ACT

Section 19(1)(b)[83] is directed to applicants: if there are reasonable grounds to believe they are or will be unable or unwilling to support themselves and those dependent on them for care and support, they are inadmissible unless they can satisfy the immigration officer that adequate arrangements have been made for care and support. "Adequate arrangements" are arrangements other than those that involve social assistance. Unemployment insurance benefits are not "social assistance".[84]

A visa officer must initially reach the conclusion that the applicant is or will be unable or unwilling to support himself or herself. The conclusion must be based on reasonable grounds. Then the proviso concluding section 19(1)(b) must be examined. It excepts from the purview of section 19(1)(b) persons who have satisfied an immigration officer that adequate arrangements, other than arrangements that involve social assistance, have been made for care and support. The sponsor's ability to fulfil the undertaking is a relevant, but not the only, consideration. If adequate arrangements have been made, then section 19(1)(b) is not a valid ground of refusal.[85] It is improper for the visa officer to proceed directly to a refusal based on the proviso without examining the first part of section 19(1)(b).[86]

It was held in the ***Oliva*** case that a sponsor may be exempt from the requirement of demonstrating an ability to fulfil an undertaking (e.g. sponsorship of a dependent son), but that a refusal may nevertheless be founded on section 19(1)(b) because the two provisions operate separately.[87]

Where an immigration officer, relying on section 19(1)(b), fails to enquire properly into the circumstances of the applicant, relies solely on the matters contained in the definition of "undertaking" and ignores the care and support available from persons other than the sponsor, the officer has failed to make the determination required. The officer has thereby failed to address either the question of the applicant's ability or willingness to support himself and his dependants, or the question of the adequacy of the arrangements made for the care and support in Canada of the applicant and his dependants.[88]

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[83] Section 19(1)(b) of the *Immigration Act* reads:

> *19.(1) No person shall be granted admission who is a member of any of the following classes:*
> *(b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support.*

[84] ***Gosal, Jasvir Kaur v. M.E.I.*** **(IAD V93-02361), Ho, July 12, 1994.**

[85] If the sponsor is unable to fulfil the undertaking, the Appeal Division may consider other factors and section 19(1)(b) may or may not be valid depending on the facts.

[86] ***Virk, Gurdeep Kaur v. M.E.I.*** **(IAB 86-6137), Mawani, Chambers, Howard, March 29, 1987.**

[87] ***Oliva, Manuela Sipin v. M.E.I.*** **(IAB 86-9299), Eglington, Warrington, Rotman, March 26, 1987.**

[88] ***Oliva, Manuela Sipin v. M.E.I.*** **(IAB 86-9299), Eglington, Warrington, Rotman, March 26, 1987.**

The Appeal Division found on the basis of ***Oliva***, that the visa officer had failed in his statutory duty to satisfy himself that settlement arrangements for the applicant (the spouse of the sponsor) were not adequate, taking into account the support available from the sponsor's brother as evidenced by the brother's Evaluation of Guarantor's Financial Circumstances. This document had been filed at the same time as the sponsor submitted his undertaking of assistance. The Appeal Division found the refusal invalid as a result. Further, the sponsor's brother's support was well within the low income cut-off necessary to support seven persons, namely, the sponsor, applicant, his wife, three children and himself. The latter evidence of support went to the humanitarian and compassionate grounds.[89]

Where a refusal letter contains a reference to section 19(1)(b) and section 6(1)(b)(iii), there is only one ground of refusal, section 19(1)(b), and that the sponsor's alleged inability to fulfil the undertaking is the reason for deeming the applicant to fall within section 19(1)(b).[90]

Where a visa officer refused an application for permanent residence under section 19(1)(b), after an immigration officer in Canada had been satisfied as to the sponsor's settlement arrangements under section 6(1)(b)(iii), the Court in ***Khakoo*** held that the visa officer had acted in error. The Court stated:

> There is nothing on the face of paragraph 19(1)(b) which would lead to an interpretation that the immigration officer who has been satisfied must be the visa officer who is considering all aspects of the applicants' application for permanent residence. Nor is there anything on the face of the paragraph 19(1)(b) or any other provision of the *Immigration Act* or *Regulations* to which I was directed, including subsection 6(1) of the *Regulations*, which would indicate in express terms, or even by necessary implication, that a visa officer has authority to override the previous satisfaction of an immigration officer even in circumstances, as here, where it is evident that the visa officer was in substantial disagreement with her colleague as to the adequacy of arrangements for support of the applicants other than through social assistance. As the applicants clearly came within the exception to paragraph 19(1)(b) noted above, the visa officer exceeded her jurisdiction in finding the applicants to be within that inadmissible class.[91]

1.9 DEFAULT AND BREACH OF UNDERTAKING

Section 118(1) of the *Immigration Act* provides that an undertaking may be assigned by the Minister to Her Majesty in right of any province. Section 118(2) of the Act provides that any payments of a prescribed nature made directly or indirectly to an immigrant that result from a breach of an undertaking may be recovered in a court of competent jurisdiction as a debt due to Her Majesty in right of Canada or in right of the province to which the undertaking is assigned.

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[89] ***Dhaliwal, Davinder Singh v. M.C.I.* (IAD V93-02589), Clark, September 14, 1994.** The usual approach is to use the brother's support as going to the legal grounds, as in ***Mann, Earlene May v. M.E.I.* (IAB V79-6171), Campbell, Glogowski, Loiselle, June 23, 1980,** where evidence of a brother's support overcame the section 19(1)(b) refusal.

[90] ***Virk, Gurdeep Kaur v. M.E.I.* (IAB 86-6137), Mawani, Chambers, Howard, March 29, 1987.**

[91] ***Khakoo, Gulshan M. v. M.C.I.* (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995, at pages 7-8.**

Section 56 of the *Immigration Regulations, 1978* provides that payments resulting from a breach of an undertaking and made directly or indirectly to an immigrant under an item described in column I of Schedule VI are payments that may be recovered from the person who gave the undertaking. Column I of Schedule VI lists payments of a prescribed nature, including income assistance under various provincial statutes.

A refusal is based on section 6(1)(b)(ii) of the *Immigration Regulations, 1978* where there has been default or breach of a previous outstanding undertaking.

An official demand for repayment is not a prerequisite for making out a default of a previous undertaking. A sponsor is in default where social assistance has been received by a relative who was the subject of the earlier undertaking and there has been no restitution of the monies paid. It matters not that the sponsor did not wish his relative to collect social assistance.[92]

Where the payments made are not listed in column I, there is no deemed breach of an undertaking. However, a sponsor may nevertheless be in default of the undertaking if he or she fails to provide lodging, care and support to the applicants. An attempt at restitution of monies paid out is a relevant factor for consideration in an appeal under section 77(3)(a) and (b) of the Act.[93]

A sponsor was not in default of his earlier undertaking for his wife since he had made arrangements to support her after their separation and divorce, there was no proof that she actually received social assistance payments and, in any event, she was no longer a member of the family class.[94]

The sponsor's parents, who were the subject of undertakings previously given by the sponsor, received social assistance for about two years, until they were eligible for old age pensions. Both parents had died by the time of the hearing. There was no evidence that the sponsor had made any restitution of the monies paid to his parents except for three cheques in the amount of $75 each payable to his father. The breach of the previous undertakings was therefore continuing.[95]

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[92] ***Randhawa, Jasbir Singh v. M.E.I.*** **(IAD V90-00554), Wlodyka, Chambers, Verma, November 30, 1990; *Tayo, Helen Posada v. M.E.I.* (IAB V87-6583), Arpin, Mawani, Gillanders, January 9, 1989.**

[93] ***Assaf, Mohamad Abdallah v. M.E.I.*** **(IAD V92-01259), Wlodyka, October 28, 1993.**

[94] ***Chaudhary, Navid Iqbal v. M.E.I.*** **(IAB 86-4144), Petryshyn, Wright, Rayburn, October 28, 1987.**

[95] ***Dhillon, Pal Singh v. M.E.I.*** **(IAD V93-01470), Verma, November 2, 1994.**

1.10 COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

Such considerations can be taken into account where the sponsor's income falls below the LICO and the conclusion is reached, based on all the factors, that the sponsor is unable to fulfil the undertaking.[96]

The usual two-prong test from ***Romeo***[97] (per Member Townshend) is applied: (1) the sponsor must present evidence that would create a desire to relieve the family's misfortunes and (2) the evidence led must be weighed against the legal impediment which caused the refusal. The objective in section 3(c) of the *Immigration Act*, "to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad" is also considered.[98]

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[96] ***Mavi, Jaswinder Kaur v. M.E.I.*** **(IAB T83-10054), Suppa, D. Davey, Glogowski, August 1, 1985.**

[97] ***Romeo, Domenica v. M.E.I.*** **(IAD 89-01205), Sherman, Weisdorf, Townshend (dissenting), February 12, 1990.**

[98] ***Bath, Satwant Kaur v. M.E.I.*** **(IAD V91-01006), Wlodyka, April 29, 1992.**

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CHAPTER 2

3. CRIMINAL REFUSALS

3.1. *Introduction*

An application for permanent residence made by a member of the family class can be refused if the applicant, and/or a dependant, is "criminally" inadmissible to Canada. The applicable provisions are found in section 19 of the *Immigration Act*.[99] The most common basis for criminal inadmissibility is because the visa officer concluded that the applicant, and/or his/her dependent, was a person described in one, or more than one, of subsections 19(1)(c), (1)(c.1), (1)(c.2), (1)(d), (2)(a), (2)(a.1) and (2)(b). All of these provisions connect the applicant to offences found in an Act of Parliament. In addition, there are other provisions which have significant criminal elements. These are subsections 19(1)(e), (1)(f), (1)(g), (1)(j), (1)(k), and (1)(l). At this time, refusals based on these provisions are less common.

The Canadian criminal law provisions in place at the time of the application for permanent residence are to be used to determine the criminal admissibility of the applicant and not subsequent prejudicial changes in the legislation.[100]

3.2. *JURISDICTION*

As indicated above, criminality makes an applicant "inadmissible" to Canada. In a section 77 appeal this means that criminality is not a jurisdictional matter but it is a ground of refusal. There is, however, a recently enacted provision of the *Immigration Act* which, if applicable, removes the jurisdiction of the Appeal Division to hear the appeal.

This provision is section 77(3.01)[101] and it provides that in two situations the jurisdiction of the Appeal Division may be removed. In the first situation, a security certificate issued pursuant to subsection

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[99] Section 19 of the *Immigration Act* is also a basis on which persons can be ordered removed from Canada. Therefore, the IAD can see issues of criminal inadmissibility when dealing with section 70 appeals from removal orders and also when dealing with section 77 appeals from sponsorship refusals.

[100] ***Reyes v. M.E.I.*** **(1987), 1 Imm. L.R. (2d) 148 (IAB).**

[101] Section 77(3.01) provides that

No appeal lies to the Appeal Division under subsection (3) in respect of a person

(a) with respect to whom a certificate has been filed under subsection 40.1(1) where it has been determined, pursuant to paragraph 40.1(4)(d), that the certificate is reasonable; or

(b) who is a member of an inadmissible class described in paragraph 19(1)(c),(c.1),(c.2) or (d) where the Minister is of the opinion that the person constitutes a danger to the public in Canada.

40.1(1) which has been determined by the Federal Court of Canada to be reasonable will oust the jurisdiction of the Appeal Division. This is a rarely seen situation. The second situation is more common. For the Appeal Division to lose jurisdiction over the appeal, the person must be within the inadmissible classes of 19(1)(c), (c.1), (c.2) or (d) and the Minister must have formed the opinion that the person is a danger to the public.

Section 77(3.01) was enacted by Bill C-44 on July 10, 1995. An issue which has arisen is whether the Minister can file his opinion that the person is a danger to the public at any time prior to the Appeal Division rendering its decision on an appeal. In the recent case of ***Tsang***[102], the Federal Court dealt with this in the situation where the appeal had been filed prior to the enactment of Bill C-44 and the hearing had commenced after the enactment. The hearing proceeded and the members reserved their decision. Prior to issuing their decision, the Minister filed his opinion. The Court determined that the Minister was entitled to file his opinion when he did and that this extinguished the right of appeal to the Appeal Division[103].

3.3. Equivalency

Subsections 19(1)(c.1) and (2)(a.1) of the *Immigration Act* contain the equivalency provisions. Equivalencing is the equating of a foreign conviction, act or omission to a Canadian offence.

Subsections 19(1)(c.1) provides as follows:

> *19(1) No person shall be granted admission who is a member of any of the following classes:*
>
> *(c.1) persons who there are reasonable grounds to believe*
>
> > *(i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or*

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[102] ***Tsang, Lannie v. M.C.I.*** **(F.C.T.D., no. IMM-2585-95), Dube, February 6, 1996.**

[103] The Court relied on the transition provisions found in section 15(3) of Bill C-44 to arrive at its conclusion. Section 15(3) provides that

> Subsection 77(3.01) of the Act, as enacted by subsection (2), applied to an appeal that has been made on or before the coming into forced of that subsection and in respect of which the hearing has not been commenced, but a person who has made such an appeal may, within fifteen days after the person has been notified that, in the opinion of the Minister, the person constitutes a danger to the public in Canada, make an application for judicial review under section 82.1 of the Act with respect to the matter that was the subject of the decision made under subsection 77(1).

> *(ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years of more,*
>
> *except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;*

Subsection 19(2)(a.1) provides as follows:

> *19(2) No immigrant and, except as provide in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:*
>
> *(a.1) person who there are reasonable grounds to believe*
>
> *(i) have been convicted of an offence that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of parliament by a maximum term of imprisonment of less than ten years, or*
>
> *(ii) have committed outside Canada an act or omission that constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years,*
>
> *except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;*

There is a distinction between subparagraphs (i) and (ii) in both 19(1)(c.1) and 19(2)(a.1). Subparagraph (i) is used in the situation where there is a conviction outside of Canada whereas subparagraph (ii) is used in the situation where there is not a conviction, but it is alleged that the person has "committed" an offence. To satisfy (i), there must be a conviction outside of Canada and this conviction must then be compared to a Canadian offence. In 19(1)(c.1)(i), the determination to be made is whether the offence outside of Canada would, if it had been committed in Canada, be an offence punishable by a **maximum term of imprisonment of ten years or more**. In 19(2)(a.1)(i), the determination to be made is whether the offence outside of Canada would, if it had been committed in Canada, be an offence punishable by way of indictment by a **maximum term of imprisonment of less than ten years.**

To satisfy subparagraphs (ii) in 19(1)(c.1) and (2)(a.1) the focus is on the commission of an offence. The first determination which must be made is whether the person has committed an act or omission which would be an offence in the place where it occurred. Once this determination is made then there must be a comparison done to a Canadian offence. In 19(1)(c.1)(ii), the determination to be made is whether the offence outside of Canada would, if it had been committed in Canada, be an offence punishable by a **maximum term of imprisonment of ten years or more**. In 19(2)(a.1)(ii), the determination to be made is whether the offence outside of Canada would, if it had been committed in Canada, be an offence punishable by way of indictment by a **maximum term of imprisonment of less than ten years**.

The standard of proof for the equivalency provisions is "reasonable grounds to believe" and not "beyond a reasonable doubt".[104] The standard of "reasonable grounds to believe" is less than a balance of probabilities.[105]

In determining whether there are "reasonable grounds to believe" a person has committed an offence abroad, the IAD should examine evidence pertaining to the offences.[106] In one case, ***Legault***, the Court held that the "contents of the warrant for arrest and the indictment" did not constitute evidence of the commission of alleged criminal offences.[107]

If the Canadian offence, to which the foreign conviction (or act or omission) is to be compared, is unconstitutional then there can be no equivalent Canadian offence.[108] However, there is no obligation to consider the constitutionality of foreign criminal law.[109]

There have been several Federal Court decisions which have provided the principles to be followed when determining equivalency.

In ***Brannson***,[110] the Court said:

> *Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond.*

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[104] ***Halm, Henry v. M.E.I.*** **(F.C.T.D., no. IMM-1073-93), Reed, February 24, 1995.**

[105] ***Halm, Henry v. M.E.I.*** **(F.C.T.D., no. IMM-1073-93), Reed, February 24, 1995;** ***Ramirez v. M.E.I.*****, [1992] 2 F.C. 306 (C.A.);** ***Sivakumar v. M.E.I.*****, [1994] 1 F.C. 433 (C.A.).**

[106] ***Legault, Alexander Henri v. S.S.C.*** **(F.C.T.D., no. IMM-7485-93), McGillis, January 17, 1995.**

[107] See ***Kiani, Raja Ishtiaq Asghar v. M.C.I.*** **(F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995,** which distinguishes ***Legault*** on its facts because in ***Kaini*** the adjudicator made an independent determination on the basis of the evidence adduced.

[108] ***Halm, Henry v. M.E.I.*****, (F.C.T.D., no. IMM-1073-93), Reed, February 24, 1995.** A recent case of the Federal Court Trial Division, ***Howard, Kenrick Kirk v. M.C.I.*** **(F.C.T.D., no. IMM-5252-94), Dube, January 4, 1996,** has stated that the Appeal Division does not have the jurisdiction to rule on the constitutionality of any legislation other than the Immigration Act. Challenges to the constitutionality of other federal legislation, as it may arise in an appeal before the IAD must be brought before the Federal Court.

[109] ***Li, Ronald Fook Shiu v. M.C.I.*** **(F.C.T.D., no. IMM-4210-94), Cullen, May 11, 1995.**

[110] ***Brannson v. M.E.I.*****, [1981] 2 F.C. 141 (F.C.A.).**

After ***Brannson***, the Court in ***Hill***[111] provided some further guidance and said that there were three ways to establish equivalency:

> *1. by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences;*
>
> *2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provision in the same words or not;*
>
> *3. by a combination of paragraph one and two.*

The visa officer is required to establish a *prima facie* case for equating the offence with a provision of the Canadian criminal law.[112] The onus, however, is always on the appellant to show that the visa officer erred in his/her determination that the applicant is criminally inadmissible to Canada.

To determine equivalency between a foreign and a Canadian offence, it is not necessary for the Minister to present evidence of the criminal statutes of the foreign state.[113] However, proof of foreign law ought to be made if the foreign statutory provisions exist.[114] Where there is no evidence of the foreign law, the evidence before the panel must be examined to determine whether the essential ingredients of the Canadian offence had to have been proven to have secured the foreign conviction.[115]

In some cases where the law of the foreign jurisdiction has not been adduced in evidence there has been use made of the legal doctrine *malum in se*. Black's Law Dictionary (5th edition) defines *malum in se* as

> *An act is said to be malum in se when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.*

In ***Dayan***, the concept of *malum in se* was used because there was no proof of the foreign law for the purposes of equivalencing. Mr. Justice Urie said the following about the use of this doctrine:

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[111] ***Hill v. M.E.I.*, (1987) 1 Imm. L.R. (2d) 1 (F.C.A.).**

[112] ***Tsang v. M.E.I.* (IAB T85-9587), Davey, Chu, Ahara January 8, 1988.**

[113] ***Dayan v. M.E.I.*, [1987] 2 F.C. 569 (C.A.).**

[114] ***Dayan v. M.E.I.*,[1987] 2 F.C. 569 (C.A.).**

[115] ***Dayan v. M.E.I.*, [1987] 2 F.C. 569 (C.A.).**

> *Reliance on the concept of offences as malum in se to prove equivalency with provisions of Criminal Code, is a device which should be resorted to by immigration authorities only when for very good reason...proof of foreign law has been difficult to make and then only when the foreign law is that of a non-common law country. It is a concept to which resort need not be had in the case of common law countries.*

If the scope of the Canadian offence is narrower than the scope of the foreign offence then it is necessary to ascertain the particulars of the offence for which the applicant was convicted.[116] It is necessary to "go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings."[117]

If the scope of the Canadian offence is wider than the scope of the foreign offence, it is not necessary to go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings.[118]

Where neither a Canadian equivalent offence nor the essential ingredients of the foreign offence are identified in the record, it may be impossible to conclude that the visa officer had made a comparison between an offence under Canadian law and the foreign offence.[119]

The availability of defences is not an essential element of the equivalency test as set out in ***Brannson*** and ***Hill***.[120]

3.4. Exceptions in subsections 19(1)(c.1) and (2)(a.1)

Paragraphs 19(1)(c.1) and (2)(a.1) provide for an exception from the inadmissibility of an individual to Canada who otherwise fits within the prescribed class. The exception is for **"persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;"**

The Minister must decide whether the applicant has rehabilitated himself or herself. The IAD does not have the jurisdiction to determine if a person has or has not been rehabilitated within the exception to subsections 19(1)(c.1) and (2)(a.1).[121] Rehabilitation is a factor, however, which the IAD can consider in the exercise of its equitable jurisdiction.

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[116] ***Brannson v. M.E.I.*, [1981] 2 F.C. 141 (C.A.).**

[117] ***Lei v. Canada* (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.).**

[118] ***Lam, Chun Wai v. M.E.I.* (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 16, 1995.**

[119] ***Jeworski v. M.E.I.* (1986), 1 Imm. L.R. (2d) 59 (IAB).**

[120] ***Li, Ronald Fook Shiu v. M.C.I.* (F.C.T.D., no. IMM-4210-94), Cullen, May 11, 1995.** This case distinguished ***Steward v. M.E.I.*** **(No. 1) (1988), 84 N.R. 236 (F.C.A.)**, on the basis that "colour of right" in the Steward offence was an essential element of the offence and not a defence.

The Minister can delegate the power to determine rehabilitation.[122]

An issue which has arisen is whether there is a duty on the visa officer to inform the applicant of the existence of the exception in paragraph 19(1)(c.1) and (2)(a.1). The Federal Court has only dealt with this issue as it relates to earlier legislation which required, in the case of subsection 19(1)(c), as it then read, for the Governor-in-Council to be satisfied as to rehabilitation. In ***Wong***[123], the applicant gave material to establish his rehabilitation to the visa officer instead of to the Governor-in-Council. The Court found it "unfortunate" that the visa officer did not assist the applicant in getting the material to the proper place, but the Court did not find this to be a reviewable error as the burden to show that the Governor-in-Council was satisfied as to rehabilitation rests with the applicant. In addition, the cases of ***Mohammed***[124], ***Gill***[125] and ***Dance***[126] indicated that the responsibility of the visa officer is to be satisfied that no decision by the Governor-in Council has been made. The issue which has not been resolved is whether this applies to the situation where the Minister makes the decision as to rehabilitation given the proximity of the visa officer to the Minister - does this impose an obligation of fairness on the visa officer to advise the applicant about the exception in these sections?[127]

One of the criteria for the application of the exception in paragraphs 19(1)(c.1) and (2)(a.1) is that "at least five years have elapsed since the expiration of any sentence imposed for the offence...". For immigration purposes, the IAD has found that "any sentence imposed" would include any period of incarceration, probation or the suspension of a privilege.[128]

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[121] ***Crawford v. M.E.I.*** **(1987), 3 Imm. L.R. (2d) 12 (IAB).**

[122] s.121 of the *Immigration Act*. This is a new power of delegation. which was enacted by Bill C-44 (in force on July 10, 1995). Under earlier legislation, the Minister could not delegate the power to decide rehabilitation in these cases. See ***Ramawad v. M.M.I,*** **[1978] 2 S.C.R. 375;** ***Simpson v. M.E.I.*** **(1987), 3 Imm. L.R. (2d) 20(IAB);** ***Crawford v. M.E.I.*** **(1987), 3 Imm. L.R. (2d) 12 (IAB).**

[123] ***Wong, Yuen-Lun v. M.C.I.*** **(F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995.**

[124] ***Mohammed v. Canada,*** **[1989] 2 F.C. 363.**

[125] ***M.E.I. v. Gill*** **(F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991.** ***Gill*** was applied in ***Dhaliwal, Jagdish Kaur v. M.E.I.*** **(IAD V91-01669), Wlodyka, Singh, MacLeod, March 29, 1993.**

[126] ***Dance, Neal John v. M.C.I.*** **(F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995.**

[127] In ***Crawford v. M.E.I*** **(1987), 3 Imm.L.R.(2d)12(I.A.B.),** the majority of the Board found that when the Minister was to determine rehabilitation a duty existed to advise the applicant of the possibility of coming within the exception. The majority stated that

> *the visa officer is responsible to act as a representative of the Minister on the issue of rehabilitation. Once the prohibition has been established under para. 19(2)(a) the visa officer has an obligation to inform the applicant of the possibility of coming within the exception from the general rule of criminal inadmissibility by showing rehabilitation to the Minister.*

3.5. *Conviction*

One of the more common inadmissible sections seen on section 77 appeals is section 19(1)(c) which provides that a person who has been convicted in Canada of an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years of more is inadmissible. This provision would apply in the circumstances where the applicant had lived in Canada at some time and therefore had been convicted in Canada.

The use of the word "convicted" in paragraphs 19(1)(c), (1)(c.1), (2)(a), (2)(a.1) and (2)(b) means a conviction that has not been expunged.[129] Foreign convictions can also be expunged. In the case of a foreign jurisdiction, the legislation providing for the expunging of a conviction should be accorded respect where the laws and the legal system are similar to ours.[130]

Certain criminal offences in Canada can be proceeded with by indictment or by summary procedures. If proceeded with by indictment it may be punishable by a maximum term of imprisonment of 10 years or more and therefore be caught by the *Immigration Act*. If the offence is proceeded with summarily then section 787(1) of the *Criminal Code* provides that the maximum term of imprisonment is six months, unless provided otherwise. For immigration purposes, a person who is convicted in Canada by summary procedure for an offence which could have been proceeded with by way of indictment (a hybrid offence) is convicted of a summary offence. [131] In the case of a foreign hybrid offence, it is irrelevant whether the foreign conviction was on indictment or summary procedure.[132]

3.6. *Subparagraph 19(2)(b)(i)*

Subsection 19(2)(b) provides as follows:

> *19(2) No immigrant and, except as provide in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:*

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[128] ***Shergill v. M.E.I.*** **(IAD, W90-00010), Rayburn, Arpin, Verma, February 19, 1991.**

[129] ***M.E.I. v. Burgon*** **(1991), 13 Imm. L.R. (2d) 102 (F.C.A.).**

[130] ***M.E.I. v. Burgon*** **(1991), 13 Imm. L.R. (2d) 102 (F.C.A.).** In ***Burgon***, the foreign jurisdiction was the United Kingdom.

[131] ***Kai Lee v. M.E.I.*****, [1980] 1 F.C. 374 (C.A.).** This case referred to earlier legislation which provided /that a person was inadmissible if they had been "convicted of an offence that, if committed in Canada, constitutes. ...an offence that may be punishable by way of indictment under any Act of Parliament..." (section 19(2)(a)). Bill C-86 (effective February 1, 1993) amended this section and it is arguable that ***Kai Lee*** is relevant in connection with section 19(1)(c).

[132] ***Potter v. M.E.I.*****, [1980] 1 F.C. 609.**

(b) persons who

> *(i) have been convicted in Canada under any Act of Parliament of two or more summary conviction offences not rising out of a single occurrence, or*
>
> *(ii) there are reasonable grounds to believe have been convicted outside Canada or two or more offences, not arising out of a single occurrence, that, if committed in Canada would constitute summary conviction offences under any Act of Parliament*
>
> *(iii) have been convicted in Canada under any Act of Parliament of a summary conviction offence, other than an offence designated as a contravention under the Contraventions Act, and there are reasonable grounds to believe have been convicted outside Canada of an offence that, if committed in Canada, would constitute a summary conviction offence under any Act of Parliament*
>
> *where any part of the sentences imposed for the offences was served or to be served at any time during the five year period immediately preceding the day on which they seek admission to Canada;*

In this subparagraph, the term "occurrence" is synonymous with the terms "event" and "incident" and not synonymous with "a course of events". Therefore, summary conviction offences which were committed on different dates arose out of different occurrences rather than a single occurrence.[133]

3.7. Compassionate or Humanitarian Considerations

For a complete discussion of compassionate or humanitarian considerations in sponsorship appeals see Chapter 9.

In the situation of criminal refusals, the fact that the Minister is not satisfied that the applicant has been rehabilitated or that the five year period has not expired does not prevent a consideration of the applicant's rehabilitation under humanitarian or compassionate considerations.[134]

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[133] ***Alouache, Samir v. M.C.I.*** **(F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995.** In this case, the applicant argued that his three convictions arose out of a single occurrence which was the applicant's difficult relationship with his former spouse. The Court did not accept this argument as the breakdown of the applicant's marriage was "a course of events" and not a single occurrence.

[134] ***Perry v. M.C.I.*** **(IAD V94-01575), Ho, November 1, 1995.**

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4. MEDICAL REFUSALS

3.1 MEDICAL EXAMINATION REQUIRED

Pursuant to subsection 11(1) of the *Immigration Act*, every immigrant must undergo a medical examination by a medical officer.

A "medical officer" is defined in subsection 2(1) of the *Immigration Act* as "...a qualified medical practitioner authorized or recognized by order of the Minister as a medical officer for the purposes of any or all provisions of this Act."

A "medical examination" includes all medical investigations and tests as are reasonably required to properly assess whether the applicant is admissible to Canada.[135] The examination may be completed through more than one test or examination, if reasonably required, and once those tests have been undergone, subsection 11(1) of the *Immigration Act* has been complied with.[136]

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[135] **Alam, Quazi Nurul v. M.E.I. *(IAD T89-06725), Townshend, Tisshaw, Bell (dissenting), July 17, 1990.***

Where an applicant has undergone a medical examination but the report resulting therefrom is never received by the visa officer, the Appeal Division has ruled that the applicant has complied with the requirements of subsection 11(1) of the *Immigration Act*.[137] The rationale behind this approach is that it is the responsibility of the visa officers to ensure that they receive the results from their medical officers.[138]

3.2 MEDICAL INADMISSIBILITY

Refusals on the grounds of medical inadmissibility are based on paragraph 19(1)(a) of the *Immigration Act*, which reads as follows.

> 19(1) No person shall be granted admission who is a member of any of the following classes:
>
> (a) Persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,

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[136] **Khan, Mobashsher Uddin v. M.E.I.** *(IAD T89-01022), Sherman, Bell, Fatsis (dissenting), July 16, 1990.*

[137] **Alam, supra,** *footnote 135, and* **Khan, supra,** *footnote 136.*

[138] **Alam, supra,** *footnote 135.*

> (i) they are or are likely to be a danger to public health or to public safety, or
>
> (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services;

3.3 LEGAL VALIDITY OF THE REFUSAL

3.3.1 Procedural Challenges

Early decisions of the Board, and especially those which followed the Federal Court's decision in *Hiramen*,[139] tended to allow the appeal on purely technical grounds based on deficiencies in the refusal letter or the medical notification form. However, later decisions of the Court generally emphasized a less technical approach, and encouraged a more purposive approach, which looked whether the appellant was informed of the case the appellant had to meet, and whether there was an expression of the opinion required under the *Immigration Act*.

The disadvantage to the appellant of winning an appeal based on a technical defect is that the visa officer may again refuse the application on the medical ground, as that ground was not one of the requirements on which the Appeal Division based its decision.[140] Where the appeal was allowed because the medical reports had expired before the visa officer rejected the application, the visa officer could again consider the medical condition, as the Board's decision did not relate to the medical condition.[141] Likewise, where the appeal was allowed because the reasons for refusal did not adequately inform the sponsor of the case to be met, the application could again be refused on the same ground, but this time with the reasons for the refusal adequately expressed.[142]

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[139] **Hiramen v. M.E.I.** *(1986), 65 N.R. 67 (F.C.A.). In* **Hiramen**, *the Court held that the entries in the Medical Notification form were inconsistent to the point of incoherence. Please refer to section 3.3.1.2.*

[140] *Subsection 77(5) of the* Immigration Act *provides that where an appeal has been allowed by the Appeal Division, processing of the application is to be resumed, and the visa officer is to approve the application if "the requirements of [the] Act and regulations, other than those requirements on which the decision of the Appeal Division has been given," have been met.*

3.3.1.1 Defective Refusal Letter

Pursuant to subsection 77(1) of the *Immigration Act*, the visa officer is required to inform the sponsor of the reasons for the refusal of the sponsored application for permanent residence. The purpose of this provision is to ensure that the sponsor/appellant is aware of the case that has to be met on appeal.

The Immigration Appeal Board has held that the nature of the medical condition must be disclosed where the refusal is based on medical inadmissibility.[143] However, the refusal letter should not be looked at in isolation from the record. [144] Subsection 77 (1) can be complied with by setting out intelligible reasons in the record.[145]

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[141] **Mangat, Parminder Singh v. Canada(Secretary of State)** ***(F.C.T.D., no. T-153-85), Strayer, February 25, 1985.***

[142] **Dhami, Gurnam Singh v. M.E.I.** ***(IAB 84-6036), Chambers, Tremblay, Howard, January 8, 1987.***

[143] **Shepherd, Tam Yue Philomena v. M.E.I.** ***(IAB 82-6093), Davey, Benedetti, Suppa, November 18, 1982.***

[144] **Re M.E.I. and Singh** ***(1987), 35 D.L.R. (4th) 680 (F.C.A.).***

[145] **Tung, Nirmal Singh v. M.E.I.** ***(I.A.B. 86-6021), Mawani, Singh, Anderson (dissenting), June 30, 1987 (See CLIC, No. 108.12, March 1988.***

3.3.1.2 Defective Medical Notification Form

After assessing an applicant's medical condition, the medical officers prepare a Medical Notification form to notify the visa officer of their diagnosis, opinions, and the applicant's medical profile. The visa officer relies on this information to determine the applicant's admissibility. The Medical Notification must contain an expression of the opinion required by paragraph 19(1)(a) of the *Immigration Act*, in order to support a refusal under that paragraph. Thus, where the information in the form is inconsistent to the point of incoherence, and is couched in terms of "possibility," rather than "probability" as is required by subparagraph 19(2)(a)(ii), the refusal based on that Medical Notification form is not valid.[146] However, in assessing the Medical Notification form, the Appeal Division should consider the form as a whole, to see if it contains on its face a clear expression of the medical opinion required by paragraph 19(1)(a).[147] Further, the Appeal Division should not find the refusal invalid because the word 'possibility' rather than 'probability' was used in the form without considering the rest of the document.[148] Nevertheless, where a probability regarding treatment was deduced from a mere possibility of health deterioration, the Court has found the Medical Notification to be defective.[149] In addition, the Court has upheld the Board's decision that the Medical Notification only expressed a possibility of excessive demands, rather than a probability, where the medical officers indicated that the progression and prognosis were unknown.[150]

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[146] **Hiramen v. M.E.I.** ***(1986), 65 N.R. 67 (F.C.A.).***

[147] **Parmar, Jaipal Singh v. M.E.I.** ***(F.C.A., no. A-836-87), Heald, Urie, Stone, May 16, 1988*****; M.E.I. v. Pattar, Sita Kaur** ***(F.C.A., no. A-710-87), Marceau, Desjardins, Pratte (dissenting), October 28, 1988*****; M.E.I. v. Sihota, Sukhminder** ***Kaur (F.C.A. no. A-76-87), Mahoney, Stone, MacGuigan, January 25, 1989*****; Bola, Lakhvir Singh v. M.E.I.** ***(F.C.A. no. A-417-88), Marceau, Stone (concurring), MacGuigan (dissenting), May 18, 1990.***

[148] **Bola, supra,** ***footnote 147.***

[149] **Badwal, Tripta v. M.E.I.** ***(F.C.A., no. A-1193-88), MacGuigan, Urie, Mahoney, November 14, 1989.***

[150] **M.E.I. v. Sidhu, Satinder Singh (F.C.A., no. A-1250-88), Desjardins, Heald, Mahoney, January 12, 1990.**

Some examples of situations in which the Medical Notification form has been found to be defective include notifications in which the concurring medical officer's signature is missing;[151] the date and name of the medical officers are not filled in;[152] the opinion under subparagraph 19(1)(a)(i) is based on "possiblity" rather than on a "probability;"[153] and, where neither box is ticked off to indicate which subparagraph of 19(1)(a) is being relied on.[154]

Where the medical notification indicates that the condition is one of "unknown pathology," the inability to determine the exact cause of the disorder or illness does not result in the Medical Notification form being deficient.[155]

Where the Medical Notification form outlines several health conditions, but did not indicate which medical profile category applied to which condition, the notification was not deficient where it contained enough information for the appellant to know the case that had to be met. Further, the narrative statement required by the *Outline of Basic Medical Criteria* in the Immigration Manual, and the criteria, are mere guidelines. The failure to comply with these guidelines is not fatal where there is other evidence to support the opinion.[156]

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[151] **Tang, Lai Keng v. M.E.I.** ***(I.A.B. 79-6093), Campbell, Glogowski, Loiselle, September 20, 1979.***

[152] **Singh, Ramesh Chandra v. M.E.I.** ***(I.A.B. 86-9306), Arkin, Ariemma, Fatsis, November 28, 1986***

[153] **Jajwan, Amarjit Singh v. M.E.I.** ***(I.A.B. 85-9454), D. Davey, Benedetti, Fatsis, July 16, 1986.*** A contrario *see* **Gill, Puran Jote Kaur v. M.E.I.** ***(I.A.B. 87-6158), Mawani, Howard, Anderson, June 23, 1988.***

[154] **Khan, Mary Angela v. M.E.I.** ***(I.A.B. 85-9043), Tisshaw, Blumer, Ahara, October 6, 1986.*** *See also,* **Mohamed, Liaquat Ali v. M.E.I.** ***(I.A.B. 85-9648), Sherman, Chu, Eglington (dissenting), July 27, 1987****, where the Board reached the opposite conclusion, relying on the narrative statement on the form.*

[155] **Pattar, supra,** *footnote 155.*

[156] **Parmar, supra,** *footnote 147.*

Where multiple health conditions are listed in the Medical Notification form, it is not always essential to identify which conditions formed the basis of the medical opinion.[157]

A refusal based on an expired Medical Notification form is invalid[158] but Medical Notification forms with the "valid until" space left blank (as is usually the case in appeals before the Appeal Division) has been held not to be subject to challenge.[159]

3.3.1.3 Procedural Fairness

There is a duty upon immigration officials to act fairly and ensure that the medical officers' opinion is reasonable.[160] What is necessary to comply with the duty of fairness will depend on the circumstances of each case.

In the case of a medical refusal, it is sufficient if an applicant who is aware of her condition, is examined by a physician and a Medical Notification form is duly made. In these circumstances, the officer need not disclose the relevant medical information to the applicant before making a decision.[161]

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[157] **Sihota, supra,** *footnote 157.*

[158] **Jean Jacques, Soutien v. M.E.I.** ***(IAB 80-1187), Scott, Houle, Tremblay, May 20, 1981.***

[159] **Fung, Alfred Wai To v. M.E.I** ***(IAB 83-6205), Hlady, Glogowski, Petryshyn, December 14, 1984;*** **Shanker, Gurdev Singh v. M.E.I.** ***(F.C.A., no. A-535-86), Mahoney, Pratte, Heald, June 25, 1987.***

[160] **Gingiovvenanu, Marcel v. M.E.I.** ***(F.C.T.D., no. IMM-3875-93), Simpson, May 12, 1995;*** **Ismaili, Zafar Iqbal v. M.C.I.** ***(F.C.T.D., no. IMM-3430-94), Cullen, August 17, 1995; and*** **Jaferi, Ali v. M.C.I.** ***(F.C.T.D.,no. IMM-4039-93), Simpson, October 24, 1995.***

[161] **Stefanska v. M.E.I.** ***(1988), 6 Imm.L.R. (2d) 66 (F.C.T.D.).***

In circumstances where the applicant is aware of a positive medical report which renders a previous medical opinion unreasonable, and where the officer has indicated that they would be contacting the applicant soon with more information, the applicant must be offered more than "an abstract opportunity to make representations to an immigration officer."[162] Rather, the applicant should be given an opportunity to respond to the negative assessment before the application is refused. There may also be a duty upon the immigration officer to undertake further investigation or call for an updated medical examination.[163]

Where the medical officers request a medical report and receive it within two weeks, the medical officers have a duty to consider the report in forming their opinions.[164]

The Federal Court in *Parmar*[165] held that its intervention was not warranted where the medical officers failed to comply strictly with all the guidelines set out in the *Immigration Manual* and the non-compliance was minimal and non-prejudicial. It further held, "it is essential for those officials both in Canada and abroad to be meticulous in ensuring that applicants for admission to this country be made aware of the basis for refusing their application for admission to Canada."

With regard to the consequences on appeal, of a finding that the visa officer failed to comply with the requirements of procedural fairness, please refer to the chapter on procedural fairness.

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[162] **Gao v. M.E.I.** ***(1993), 18 Imm.L.R. (2d) 306 (F.C.T.D.).***

[163] **Ibid.**

[164] **Lee, Sing v. M.E.I.** ***(F.C.T.D., no. T-2459-85), Martin, May 1, 1986.***

[165] **Parmar, supra,** *footnote 147.*

3.3.2 Substantive Challenges

3.3.2.1 Medical Officer's Opinion

The Board must decide whether the opinion expressed by the medical officers pursuant to paragraph 19(1)(a) of the *Immigration Act*, regarding excessive demands or danger to public health or safety, is reasonable, based on the circumstances of the particular case.[166]

> It is therefore open to an appellant to show that the medical officers' opinion was unreasonable and this may be done by the production of evidence from medical witnesses other than 'medical officers'. However, evidence that simply tends to show that the person concerned is no longer suffering form the medical condition which formed the basis of the medical officers' opinion is clearly not enough; the medical officers may well have been wrong in their prognosis but so long as the person concerned was suffering from the medical condition and their opinion as to its consequences was reasonable at the time it was given and relied on by the visa officer, the latter's refusal of the sponsored application was well founded.[167]

"Reasonableness" is a question of fact; thus it is incumbent on a sponsor to establish an evidentiary foundation to any such challenge.[168]

The Appeal Division should not assume that the medical officer's opinion is reasonable based only on an agreement that the medical condition exists.[169]

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[166] **Ahir v. M.E.I.** ***[1984] 1 F.C. 1098 (C.A.).***

[167] **Mohamed v. M.E.I.,** ***[1986] 3 F.C. 90 (C.A.), at page 98.***

[168] **Takhar, Manjit Singh v. M.E.I.** ***(IAD V90-00588), Wlodyka, Chambers, Verma, March 4, 1991.***

[169] **Deol v. M.E.I.** ***(1992), 18 Imm.L.R. (2d) 1 (F.C.A.).***

In assessing reasonableness, the Board should consider whether the medical officers applied the correct criteria in assessing the applicant.[170] "Tests of admissibility must be relevant to the purpose and duration for which admission is sought."[171] It is unreasonable for the medical officers to assess a visitor based on the same criteria used to assess an immigrant.[172] Likewise, an applicant who is included in the principal applicant's application as a dependant, should not be assessed as an independent applicant, who is required to establish self-sufficiency.[173]

"The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence,[174] or failure to consider the factors stipulated in s.22 of the Regulations."[175]

Following cases like *Jiwanpuri*,[176] it appears that the Appeal Division can consider evidence other than strictly medical evidence to question the reasonableness of the medical opinion.

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[170] **Ibid.**

[171] *Adjudicator Leckie as quoted, and approved, by the Court in* **Ahir, supra,** *footnote 166, at page 1101. See also,* **Deol, supra,** *footnote 169,* **Ng, Kam Fai Andrew v. M.C.I.** ***(F.C.T.D., no. IMM-2903-94), Jerome, January 16, 1996;*** *and* **Chu, Raymond Tak Wah v.** *M.C.I.* ***(F.C.T.D., no. IMM-272-94), Jerome, January 16, 1996.***

[172] **Ahir, supra,** *footnote 166.*

[173] **Ng, supra** *footnote 171; and* **Chu, supra** *footnote 171. See also,* **Deol, supra,** *footnote 169, where the Appeal Division failed to consider that the medical officers appeared to have assessed the applicant as a "new worker" rather than as a sponsored dependant.*

[174] **Ismaili, supra** *footnote 160.*

[175] **Gao, supra,** *footnote 162.*

[176] **M.E.I. v. Jiwanpuri** ***(1990), 10 Imm.L.R. (2d) 241 (F.C.A.) at 247.***

Special mention must be made of cases involving mental retardation. The concept of mental retardation cannot be used as a stereotype. The degree and probable consequences of that degree of retardation for excessive demands must be assessed by the Appeal Division. It is an error for a medical officer to fail to specify the degree of mental retardation, thus making it difficult to assess the reasonableness of his finding. [177]

3.3.2.2 The Diagnosis

The Federal Court's statement in *Mohamed,*[178] that the applicant must have been suffering from the medical condition diagnosed by the medical officers, may have seemed to indicate that the Appeal Division is to consider the correctness of the medical diagnosis made by the medical officers. Likewise the Court's statement in *Uppal,*[179] that whether a diagnosis is correct is a question of fact on which the parties may lead evidence, may have lead to the same conclusion. However, in neither of these cases was the issue directly before the Court. In *Uppal*, the issue was whether the diagnosis was vague, and in *Mohamed*, the issue was the reasonableness of the medical officers' opinions. However, in *Jiwanpuri*,[180] the issue came directly before the Court. The Appeal Division had found that the medical officer's diagnosis was erroneous, based on the evidence before them. The Federal Court held that the Appeal Division cannot question the **correctness** of a medical diagnosis, as it does not have the necessary expertise to do so, and should not do so even with the help of expert medical evidence.[181]

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[177] **Deol, supra,** *footnote 169,* **Sabater Jr., Llamado D. v. M.C.I.** ***(F.C.T.D., no. IMM-2519-93), McKeown, October 13, 1995.***

[178] **Mohamed, supra,** *footnote 167.*

[179] **Uppal v. M.E.I.** ***(1987), 2 Imm.L.R. (2d) 143 (F.C.A.).***

[180] **Jiwanpuri, supra,** *footnote 176.*

[181] **Ibid.**

The Appeal Division has interpreted the Federal Court cases as still allowing the Board to determine whether or not the diagnosis is vague, ambiguous, uncertain or insufficient. If there has not been a definite diagnosis, it cannot support the opinion reached by the medical officers.[182] If there has been a definite diagnosis, its correctness cannot be challenged.

Whether a diagnosis is vague, insufficient, uncertain and ambiguous is a question of fact, rather than law, that must be determined after examining the evidence presented.[183]

The medical officers must base their diagnosis and opinion on medical evidence as to the applicant's condition. The fact that the applicant has been found "unfit, by reason of insanity, to stand trial for murder and has since, at all material times, been detained under a Lieutenant Governor's warrant...," does not automatically support the conclusion that the applicant might reasonably be expected to cause excessive demands on health or social services.[184] A diagnosis cannot be based only on an admission of a charge of conspiring to supply controlled drugs, and of past drug addiction. Neither does the fact that someone had been addicted to drugs automatically bring the person within subparagraph 19(1)(a)(ii) of the *Immigration Act*.[185]

3.3.2.3 Excessive Demands

"Excessive demands" in subparagraph 19(1)(a)(ii) of the *Immigration Act* are currently not defined. While section 10 of S.C. 1992, c.49 will amend subparagraph 19(1)(a)(ii) to provide for a definition in the Regulations, that provision has not yet been declared into force.

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[182] **Nijjar, Ranjit Singh v. M.E.I.** *(I.A.D. V89-000964), Wlodkya, Chambers, Verma, January 9, 1991.*

[183] **Uppal, supra,** *footnote 179, and* **Shanker, supra,** *footnote 159.*

[184] **Seyoum, Zerom v. M.E.I.** *(F.C.A., no. A-412-90), Mahoney, Stone, Decary, November 15, 1990.*

[185] **Burgon v. M.E.I.** *(1991), 13 Imm.L.R. (2d) 102 (F.C.A.).*

"Excessive demands" was held in *Jim*,[186] subsequently affirmed in *Choi*[187] as being "more than what is normal or necessary". The Court did accept "excessive demands" as meaning "unreasonable" or "beyond what the system reasonably provides to everyone." In *Nyvlt*,[188] Reed, J. relied on the factors set out in section 22 of the *Immigration Regulations, 1978*, in determining the meaning of "excessive demands." However, it should be kept in mind that the Court subsequently held that section 22 is *ultra vires* to the extent that section 22 sets out factors to be considered in forming an opinion as to excessive demands.[189]

Excessive demands should not be inferred merely from the existence of the medical condition. The Appeal Division must consider the degree of impairment and the likelihood of excessive demands being placed on health or social services.[190]

There should be some evidentiary basis for determining that an applicant would cause or might reasonably expected to cause excessive demands.[191]

An opinion based on the need for special schooling, training, and indefinite home care and supervision, was found to be reasonable in *Choi*.[192] In *Jaferi*,[193] the daughter of an applicant was found to be developmentally handicapped and that her special schooling would cost 260 per cent more than schooling for a healthy child. The Court found that the medical officers' finding was not unreasonable. However, in *Ismaili*,[194] the Court found that the visa officer did not properly consider the issue of excessive demands as the evidence was that the applicant's son required a vitamin supplement at a cost of $12 per month and that there was no waiting list at the special school he required. Cost of the special schooling was not canvassed, unlike in *Jaferi*.[195] Finally in *Sabater Jr.*, the Court held that "services provided by schools to the handicapped may be considered as social services."[196]

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[186] **Jim v. Solicitor General,** *22 Imm.L.R. (2d) 261 (F.C.T.D.).*

[187] **Choi v. M.C.I.,** *29 Imm.L.R. (2d) 85 (F.C.T.D.).*

[188] **Nyvlt v. Secretary of State** *(1994), 26 Imm.L.R. (2d) 95 (F.C.T.D.).*

[189] *See discussion of* **Ismaili, supra,** *footnote 160 in section 3.2.2.3 below.*

[190] **Deol, supra,** *footnote 169.*

[191] **Seyoum, supra,** *footnote 184, and* **Burgon, supra,** *footnote 185.*

[192] **Choi, supra,** *footnote 187.*

The degree of mental retardation must be indicated by the medical officers, as there may be a higher level of proof required to establish excessive demands in the case of mild retardation.[197]

If a finding of excessive demands is based not on the medical condition as such, but on the potential that family support might fail, there must be evidence as to the probability of such failure.[198]

It is irrelevant that an applicant is wealthy and can afford to pay for special care. The Minister cannot impose as a term or condition of admission that the applicant waive all rights to social services.[199]

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[193] **Jaferi, supra,** *footnote 193.*

[194] **Ismaili v. M.C.I.** ***(1995), 29 Imm.L.R. 1 (F.C.T.D.).***

[195] **Jaferi, supra,** *footnote 160.*

[196] **Sabater Jr., supra,** *footnote 177.*

[197] **Ibid.**

[198] **Litt, Jasmail Singh v. M.C.I.** ***(F.C.T.D., no. IMM-2296-94), Rothstein, February 17, 1995.***

[199] **Choi, supra,** *footnote 187.*

3.3.2.4 Section 22 of the Immigration Regulations

On February 1, 1993, paragraph 114(1)(m) of the *Immigration Act* was amended such that the Governor in Council's power to prescribe the factors to be considered in determining excessive demands was removed.[200] Subsequently, section 22 of the *Immigration Regulations, 1978* was held to be partially *ultra vires* by the Federal Court, Trial Division in *Ismaili.*[201] The Court held that section 22 "... should only be read as prescribing the factors to be considered on the health and safety issue." " Subparagraph 19(1)(a)(ii) of the *Act* must be interpreted without reference to the provisions of section 22 of the Regulations."

The Federal Court has held on several occasions that the medical officers err in law if they fail to take into consideration the factors set out in section 22 of the *Immigration Regulations, 1978.*[202] Given the *Ismaili* decision, those cases currently only pertain to that portion of section 22 which is relevant to determining whether an applicant is likely to be a danger to public health or public safety. In any case, the medical officers may also look at factors outside of section 22.[203]

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[200] *S.C. 1992, c.49, s.102(4).*

[201] **Ismaili, supra,** *footnote 160.*

[202] *See for example,* **Jiwanpuri, supra,** *footnote 176, and* **Gao, supra,** *footnote 162.*

[203] **Sabater Jr., supra,** *footnote 177.*

3.3.2.5 Timing

To the extent that they are based on the "opinion of a medical officer concurred in by at least one other medical officer,"[204] medical refusals are an exception to the *Kahlon* principle that the Board is to determine the admissibility of the applicants at the time of the hearing.[205] Generally, the reasonableness of a medical opinion is to be assessed at the time it was given and relied on by a visa officer.[206] Nevertheless, in making that assessment, the Appeal Division may rely on any relevant evidence adduced before it.[207] Further, where the Appeal Division is presented with a new opinion of a medical officer concurred in by another medical officer, it is the reasonableness of that opinion that must be assessed.[208]

Evidence as to an applicant's condition subsequent to the refusal has limited relevance to the legal validity of the refusal. In *Shanker*, the Court held that evidence of an applicant's medical condition subsequent to the refusal is not relevant to the legality of the refusal.[209] However, it may still be relevant to the extent that it can demonstrate that the medical officers' opinion was unreasonable at the time it was given and relied on by the visa officer.[210] It is not enough to simply show that the applicant is no longer suffering from the medical condition.[211]

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[204] *Paragraph 19(1)(a) of the* Immigration Act.

[205] **Kahlon v. M.E.I.** ***(1989), 7 Imm.L.R. (2d) 91 (F.C.A.).***

[206] *See for example*, **Jiwanpuri, supra,** *footnote 176*, **Gao, supra,** *footnote 162., and* **Mohamed, supra,** *footnote 167.*

[207] **Jiwanpuri, supra,** *footnote 176.*

[208] **Kahlon, supra,** *footnote 205.*

[209] **Shanker, supra,** *footnote 159.*

[210] **Jiwanpuri, supra,** *footnote 176.*

[211] **Mohamed, supra,** *footnote 167.*

3.4 COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

Detailed discussion of this topic is in Chapter 9. Of particular relevance when considering compassionate or humanitarian factors within the context of medical inadmissibility is evidence of an applicant's current state of health: improvement or cure will weigh heavily in favour of the sponsor (although a decision to grant special relief ought not to turn solely on this criterion),[212] while evidence that the condition is stable or has deteriorated may weigh against the sponsor.[213]

The Appeal Division should not fetter its discretion by not considering all factors relevant to its determination. For example, in *Deol*,[214] the Appeal Division focused on the refusal of the family to acknowledge the mental retardation of one of its members, and the successful functioning of the two households. At the same time the Appeal Division failed to consider, particularly, the nature of the medical condition of mental retardation, "the psychological dependencies it engenders and the close bonds of affection that may arise in such a family, all in light of the objective ...of the *Immigration Act* of facilitating the reunion of close relatives in Canada."[215]

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[212] **Choi, Tommy Yuen Hung v. M.E.I.** ***(IAB 84-9134), Weisdorf, Suppa, Teitelbaum, September 2, 1986.***

[213] **Zheng, Bi Quing v. M.E.I.** ***(IAD T91-01428), Sherman, Weisdorf, Tisshaw, January 3, 1992;*** **Tonnie v. M.E.I.** ***(IAD T91-00202), Bell, Fatsis, Singh, March 30, 1992;*** **Moledina, Narjis v. M.E.I.** ***(IAD T91-02516), Ahara, Chu, Fatsis, May 8, 1992.***

[214] **Deol, supra,** *footnote 169.*

[215] **Deol, supra,** *footnote 169, page 7.*

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CHAPTER 4

5. FOREIGN ADOPTIONS

Children who have been adopted by permanent residents or Canadian citizens may qualify as members of the family class pursuant to paragraph (b) of the definition of "member of the family class" in section 2(1) of the *Immigration Regulations, 1978* (the "*Regulations*") and be sponsored as such.[216]

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[216] Children who have not yet been adopted but whom the sponsor intends to adopt outside their country of origin may also qualify as members of the family class under exceptional circumstances (see paragraph (g) of the definition of "member of the family class" in section 2(1) of the Regulations).

5.1. Definitions

Prior to 1 February 1993, the definition of "adopted" in section 2(1) of the Regulations read as follows:

> *2(1) "adopted" means adopted in accordance with the laws of any province of Canada or of any country other than Canada or any political subdivision thereof where the adoption created a relationship of parent and child;*

Substantial changes concerning adoptions were made to the Regulations on 1 February 1993 and 17 March 1994. They are as follows:

> *2(1) "adopted" means a person who is adopted in accordance with the laws of a province or of a country other than Canada or any political subdivision thereof, where the adoption creates a genuine relationship of parent and child, but does not include a person who is adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person's relatives; (***adopté***) [SOR/93-44] (effective 1 February 1993)*
>
> ***
>
> *6.1(3) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority may only sponsor an application for landing made by a member of the family class if an immigration officer is satisfied that the revocation of the adoption was not obtained for the purpose of sponsoring an application for landing made by that member.*
>
> *[SOR/93-44] (effective 1 February 1993)*
>
> ***
>
> *2(1) "daughter" means, with respect to a person, a female*
>
> *(a) who is the issue of that person and who has not been adopted by another person, or*
>
> *(b) who has been adopted by that person before having attained 19 years of age; (***fille***)*
>
> *[SOR/93-44] (effective 1 February 1993)*
>
> ***
>
> *2(1) "son" means, with respect to a person, a male*
>
> *(a) who is the issue of that person and who has not been adopted by another person, or*
>
> *(b) who has been adopted by that person before having attained 19 years of age; (***fils***)*
>
> *[SOR/93-44] (effective 1 February 1993)*
>
> ***
>
> *6.(1) Subject to subsections (1.1), (3.1), (3.2), (4), (5) and (6), where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member and the member's accompanying dependants if*
>
> *(e) in the case of a person described in paragraph (b) of the definition "member of the family class" in subsection 2(1), or a dependant of a member of the family class, who has been adopted, the person or dependant was adopted before having attained 19 years of age and was not adopted for the purpose of gaining admission to Canada of the person or dependant, or gaining the admission to Canada of any of the person's or dependant's relatives.*

[SOR/94-242] (effective 17 March 1994)

(1.01) Paragraph (1)(e) is retroactive and applies in respect of all applications for landing made by members of the family class pending on 15 April 1994. [SOR/94-242] (effective 17 March 1994)

5.2. *Interpretation of New Provisions*

These amendments bring the age limit for an adoption to take place for immigration purposes to under nineteen years.[217] The amendments[218] also seek to prevent anyone from using adoption as a means to circumvent other immigration requirements. They are intended to prohibit what is commonly known as "adoptions of convenience", just like "marriages of convenience" are also prohibited under the Regulations. It should be noted here that although the caselaw of the Appeal Division generally held that the concept of "adoption of convenience" did not exist prior to the amendments, two recent Federal Court decisions suggest that the bona fides of the "relationship of parent and child" under the pre 1 February, 1993 definition of "adopted" should be examined.[219]

The new provisions on adoptions have not yet been the subject of extensive interpretation. The definition of "adopted" in section 2(1) of the Regulations outlines three conditions for an adoption to be recognized for immigration purposes:

i The adoption must be legal under the laws of the jurisdiction where it was performed;

ii The adoption creates a genuine relationship of parent and child and

iii The person has not been adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person's relatives.

Conditions (ii) and (iii) above of the new definition of "adopted" will undoubtedly be the subject of interpretation by the IAD. It may be argued that the genuineness aspect of the adoption and its purpose are intimately related and cannot be examined separately. However, a plain reading of the definition of "adopted" leaves no doubt that they are, at least in theory, distinct conditions. Moreover, if an applicant fails either one of these two conditions, a refusal could be issued. A non-genuine parent and child relationship would suffice to refuse an application for landing, without the need to examine the immigration purpose of the adoption.

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[217] Prior to 1 February, 1993, adoptions had to take place prior to the child attaining thirteen years of age. Note however that some foreign legislation may provide for a different age restriction. For example section 10(iv) of the *Hindu Adoptions and Maintenance Act, 1956* provides that the adoption must take place before the child has completed the age of fifteen, unless a custom or usage permits the adoption of a child over the age of fifteen.

[218] For caselaw related to the definition of "adopted" prior to 1 February 1993 and the interpretation of some sections of the *Hindu Adoptions and Maintenance Act, 1956*, see Wlodyka, Andrew; Guide to Adoptions under the ***Hindu Adoptions and Maintenance Act, 1956***, 25 Imm.L.R. (2d) 8.

[219] ***M.C.I. v. Sharma, Chaman Jit*** (F.C.T.D., no. IMM-453-95) Wetston, August 28, 1995; ***M.C.I. v. Edrada, Leonardo Lagmacy*** (F.C.T.D., no. IMM-5199-94) MacKay, February 29, 1996. For caselaw on the concept of "adoption of convenience" under the former definition of "adopted", see ***Sahota, Manjit Singh v. M.E.I.*** (I.A.B. 83-6510), Howard, Anderson, Davey, February 11, 1985 and ***Kalair, Sohan Singh v. M.E.I.*** (I.A.B. 82-6104), Chambers, Howard, Davey, January 9, 1987.

The definition of "adopted" gives no guidance on whether the mere presence of an immigration purpose is sufficient or whether it must be the primary purpose.[220] It is possible that there may be cases where there is evidence of a genuine parent—child relationship, (for example evidence of a nurturing, educational participation and supervision by the adoptive parents), and at the same time, evidence that gaining admission to Canada was the purpose of the adoption, although this may be rare. Evidence of "immigration purpose" could be established through admissions, hostile witnesses or correspondence. The evidence of the "immigration purpose" may be weak but undeniable; the evidence of a genuine parent-child relationship may be strong.

This possibility of a genuine relationship accompanied by an "immigration purpose" raises an unresolved legal issue. It is suggested that the genuineness of the relationship is the more important element and that a primary purpose of admission to Canada is required in order to exclude an adoptee from membership in the family class, rather than a mere purpose of gaining admission to Canada. Otherwise, the naive admission that an applicant's adoption would facilitate the adoptee's admission to Canada could destroy an adoption where there is a genuine parent-child relationship. More commonly, it is likely that the Minister will rely on the weakness of the evidence of a genuine parent-child relationship to argue that the adoption was performed for immigration purposes.

As in marriages of convenience, the determination that a particular adoption is one of convenience is a question of appreciation of all the facts and circumstances surrounding the adoption. The following are some factors which may be considered when assessing the genuineness of an adoption. The list is by no means exhaustive. These factors should be looked at in total, and the significance of any one factor will depend on the particular circumstances of the case.

- The relationship between the adoptive parents and the child before and after the adoption. What is the nature and frequency of contact?
- The nature of continued contact if any, between the adoptee and the natural parents. What is the motivation of the natural parents?
- The viability, stability and composition of the adoptive family. The motivation for the adoption.

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[220] See by way of comparison section 4(3) of the *Immigration Regulations, 1978*, which provides:

> 4 (3) The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse. [SOR/93-44]

- The timing of the actual transfer of the child from one family to another.

- The timing of the sponsorship application in the context of the particular facts.

- The composition of the adopted child's biological family. This may be of importance in the cultural context of the family. Is the child an only child? Does the child have siblings of the same sex? The viability and stability of the biological family may also be taken into account.

- The age of the child at the time of the adoption. Is the child an infant or a teenager who has always lived with his/her natural parents without problems? Depending on the age of the child, what is the extent of the child's knowledge of his/her adoptive family.

- The age difference between the child and the adoptive parents.

- The existence of documentary acknowledgment that the child is the son or daughter of the adoptive parents (school certificates, passport, income tax reports, etc.).

- Previous attempts by the biological family to migrate to Canada.

- Plans for the child's future in Canada.

One recent decision of the IAD examined the issue of genuine relationship of parent and child and factors somewhat similar to the above were listed as relevant to determine the issue:

> *The question then is, what constitutes a genuine relationship of parent and child? Or more appropriately, what are the factors that could be considered in assessing the genuineness of a parent-child relationship in respect of an adoption within the meaning of the* Immigration Regulations, 1978*?*
>
> *The answer to such a question may appear to be intuitive, however, upon reflection, like all considerations involving human conditions, the answer is inherently complex. Nonetheless, guidance may be found in the commonly accepted premise that generally parents act in the best interest of their children.*

With this in mind, the panel identified some of the factors that may assist in assessing a relationship of parent and child. These are:

(a) motivation of the adopting parent(s) and;

(b) to a lesser extent, the motivation and conditions of the natural parent(s);

(c) authority and suasion of the adopting parent(s) over the adopted child;

(d) supplanting of the authority of the natural parent(s) by that of the adoptive parent(s);

(e) relationship of the adopted child with the natural parent(s) after adoption;

(f) treatment of the adopted child versus natural children by the adopting parent(s);

(g) relationship between the adopted child and the adopting parent(s) before the adoption;

(h) changes flowing from the new status of the adopted child such as records, entitlements, etc., and including documentary acknowledgment that the child is the son or daughter of the adoptive parent(s); and

(i) arrangements and actions taken by the adoptive parent(s) as it relates to caring, providing and planning for the adopted child.

This list of factors is not exhaustive. Some factors may not be applicable to facts of a particular case while others not included in this list may be relevant.[221]

In assessing the genuineness of the relationship created by the adoption, no guidance is provided in the definition of "adopted" as to whose intentions should be looked at (adoptive parents, natural parents, child). It is recommended that all the circumstances of the case be analyzed, including the demonstrated intentions and declarations of both adoptive and natural parents when available. In the case of young children, it is suggested that their intentions may not be a proper consideration.[222] This would not however preclude considering and assessing the declarations of a child in the context of other available evidence.

5.3. Transitional Provisions

Any application initiated on or after 1 February 1993 will be treated according to the new definitions of "adopted", "daughter" and "son" which came into effect on that date. The effective ("lock-in") date of a sponsored application for permanent residence is the date of filing of the application itself and not the date of the undertaking of assistance.[223]

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[221] See ***De Guzman, Leonor G. v. M.C.I.***, (IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995, at pp. 4-5. See also *supra*, note 219 references to case law on the concept of "adoption of convenience" under the former definition of "adopted".

[222] See by analogy ***Bal, Sukhjinder Singh et al. v. S.G.C.***, (F.C.T.D., no. IMM-1212-93), McKeown, October 19, 1993.

[223] ***Canada v. Lidder*** [1992] 2 F.C. 621 (C.A.), followed recently in ***M.C.I. v. San Luis, Luzviminda Peralta***, (F.C.T.D., no. IMM-5054-94), Dubé, July 6, 1995. Note however that CIC appears to consider a different "lock-in" date which is more generous than ***Lidder***. CIC considers the earliest of the following two: sponsorship or application for permanent residence plus fee (IS 94-07, 04 March 1994). [Note that the Immigration Manual does not bind the IAD]. See also ***M.C.I. v. Jimenez, Emilia***, (F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.

The case of ***M.E.I. v. Porter, Kathleen***, (F.C.A., no. A-353-87), Hugessen, MacGuigan, Desjardins, April 14, 1988 should also be kept in mind. It held that "the visa officer's refusal based on an administrative delay of the Minister's own creation" was invalid in law. The circumstances for the delay in the filing of the application for permanent residence would have to be examined.

For applications filed prior to 1 February 1993, section 6(1)(e) of the Regulations reiterates the concept of adoption of convenience and its application was made retroactive (section 6(1.01)) to applications for landing pending on 15 April 1994. Section 6(1)(e) applies to applications submitted prior to 1 February 1993 and which have not been concluded on 15 April 1994, except where the undertaking of assistance was filed prior to 27 March 1992. Section 6(1)(e) is very specific in that it states that it only applies to persons "described in paragraph (b) of the definition of "member of the family class" in section 2(1), or a dependant of a member of the family class...". Thus, it would not apply to persons who filed their undertakings before 27 March 1992, as the definition of "member of the family class", which came into force on 1 February 1993, does not apply to them.[224]

A "pending application" should be understood as one which was filed before 1 February 1993 and for which a decision had not been made on 15 April 1994.

It should be noted that section 6(1)(e) does not address the aspect of "genuine relationship" found in the definition of "adopted" but only refers to "the purpose of gaining admission". The intent behind this different wording is not clear and it could be argued that it is merely an oversight with no significant consequence. A non genuine relationship in these circumstances is generally one that is intended mainly to facilitate immigration as a family class member. And a relationship created for the purpose of facilitating immigration to Canada would likely be one of convenience. It is also of interest to note that the IAD would retain its equity jurisdiction in a section 6(1)(e) refusal but not under section 2(1) because a person who does not meet the definition of "adopted" would not be a member of the family class.

5.4. *Splitting of Applications*

Although less frequent, there may be cases involving the sponsorship of parents as members of the family class whose applications include as dependants one or more children adopted by them. In these types of cases, the listed dependant's adoption may have taken place on or after the dependant's 19th birthday or it may be one of convenience.

Where the principal applicant upon being informed, refuses to delete the listed adopted dependant from the application, the entire application may be refused or all remaining family members may be processed towards visa issuance without regard to the adopted dependant.[225] The latter course of action would remove any right of appeal to the IAD unless the adopted dependant also qualified as a member of the family class in his or her own right.[226] At least one IAD decision however suggests that the IAD retains jurisdiction over the refusal of accompanying dependants who are not members of the family class in relation to the sponsor.[227]

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[224] Section 11 of SOR 92-101 provides:

> "The *Immigration Regulations, 1978*, as they read immediately before the coming into force of these amendments, shall continue to apply in respect of any member of the family class where, before the date of the coming into force of these amendments, (a) a sponsor in Quebec has submitted a form 1344 on behalf of that person to the Minister; or (b) any other sponsor has given an undertaking to the Minister."

[225] ***Mundi v. M.E.I.*** [1986] 1 F.C.182 (C.A.). Note that posts abroad appear to have received different instructions as to which course of action should be preferred. IS 94-07 (04 March 94) suggests that if the principal applicant does not agree to deleting the adopted dependant's name from the application, "it will be refused in total because the adopted child does not meet the requirements of R6(1)(e) and is not a member of the 'family class'..." IS 95-01 (11 Jan 95) however is to the

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effect that the child be deleted and processing be completed for all other eligible applicants [Note that the Immigration Manual does not bind the IAD]. On this change of policy, see ***Khera, Joga Singh et al. v. M.C.I.***, (F.C.T.D., no. IMM-3009-95), Muldoon, December 14, 1995.

[226] ***Bailon, Leonila Catillo v. M.E.I.***, (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986, QL, [1986] F.C.J. No. 386.

[227] ***M.C.I. v. Mathew, Suresh*** (IAD T93-07743), Aterman, December 22, 1994.

CHAPTER 4

CASE LIST: FOREIGN ADOPTIONS

Bailon, Leonila Catillo v. M.E.I., **(F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986, QL, [1986] F.C.J. No. 386. 4-8**

Bal, Sukhjinder Singh et al. v. S.G.C., **(F.C.T.D., no. IMM-1212-93), McKeown, October 19, 1993. 4-6**

De Guzman, Leonor G. v. M.C.I., **(IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995. 4-6**

Edrada: M.C.I. v. Edrada, Leonardo Lagmacy **(F.C.T.D., no. IMM-5199-94) MacKay, February 29, 1996. 4-3**

Jimenez: M.C.I. v. Jimenez, Emilia, **(F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995. 4-6**

Kalair, Sohan Singh v. M.E.I. **(I.A.B. 82-6104), Chambers, Howard, Davey, January 9, 1987. 4-3**

Khera, Joga Singh et al. v. M.C.I., **(F.C.T.D., no. IMM-3009-95), Muldoon, December 14, 1995. 4-7**

Lidder: Canada v. Lidder **[1992] 2 F.C. 621 (C.A.). 4-6**

Mathew: M.C.I. v. Mathew, Suresh **(IAD T93-07743), Aterman, December 22, 1994. 4-8**

Mundi v. M.E.I. **[1986] 1 F.C.182 (C.A.). 4-7**

Porter: M.E.I. v. Porter, Kathleen, **(F.C.A., no. A-353-87), Hugessen, MacGuigan, Desjardins, April 14, 1988. 4-6**

Sahota, Manjit Singh v. M.E.I. **(I.A.B. 83-6510), Howard, Anderson, Davey, February 11, 1985. 4-3**

San Luis: M.C.I. v. San Luis, Luzviminda Peralta, **(F.C.T.D., no. IMM-5054-94), Dubé, July 6, 1995. 4-6**

Sharma: M.C.I. v. Sharma, Chaman Jit **(F.C.T.D., no. IMM-453-95) Wetston, August 28, 1995. 4-3, 4-6**

6. Foreign Marriages

5.1 GENERALLY

A visa officer may refuse an application for permanent residence by the alleged spouse of a sponsor because the alleged spouse has failed to prove the validity of the marriage.

5.2 DEFINITIONS

Where the validity of a marriage is in issue on appeal, the following definitions of "spouse" and of "marriage" set out in section 2 of the *Immigration Regulations, 1978* (the "*Regulations*") are relevant:

> *"spouse", with respect to any person, means the party of the opposite sex to whom that person is joined in marriage*
>
> *"marriage" means the matrimony recognized as a marriage by the laws of the country in which it took place, but does not include any matrimony whereby one party to that matrimony became at any given time the spouse of more than one living person.*

5.3 INTERPRETATION

The definition of marriage in the Regulations includes both the state of being married (essential validity) and the ceremony of marriage (formal validity).[228]

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[228] ***Virk, Sukhpal Kaur*** **v. *M.E.I.* (IAD V91-01246), Wlodyka, Gillanders, Verma, February 9, 1993.**

5.3.1 Formal Validity

In general, formal validity includes the nature of, and prerequisites for, a ceremony.[229] Formal validity is determined in accordance with the law of the place where the marriage was celebrated. Where the law of the place is foreign law, it must be proved as any other fact by the party who is relying on it.[230]

Therefore, when it is alleged, for example, that a marriage has not been duly solemnized, local marriage law applies and it must be decided whether the marriage in question complies with the formal requirements of that law. If it does not, then the effect of this defect must also be decided in accordance with that same law. In the absence of evidence to the contrary, it must be presumed that the foreign law purports to be exhaustive as to the defects that invalidate a marriage.[231] Depending on the applicable law, as proved, the absence of a ceremony may[232] or may not invalidate the marriage.[233] If the marriage is invalid, the applicant is not the spouse of the sponsor and therefore not a member of the family class.

Where an application for landing is validly refused on the grounds of failure to properly solemnize the marriage, but the sponsor and applicant go through a proper religious ceremony following the refusal, that ground becomes invalid in the context of an appeal which is a hearing *de novo*.[234]

5.3.2 Registration

Where the validity of a marriage is in issue and the marriage has been registered, it must be determined what effect registration has on the validity of the marriage. Registration creates a presumption that a marriage has met the requirements for formal validity. In other words, registration constitutes *prima facie* evidence of the marriage and of the validity of the marriage[235] until a court of competent jurisdiction rules otherwise[236] or "until compelling evidence is adduced to show that the marriage was not duly solemnized prior to its registration".[237]

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[229] **McLeod, James G.,** ***The Conflict of Laws*** (Calgary: Carswell, 1983), at page 253.

[230] ***Lit, Jaswant Singh*** **v.** ***M.E.I.*** **(IAB 76-6003), Scott, Benedetti, Legare, August 13, 1976 and May 30, 1978.**

[231] ***Infra***, footnote 232.

[232] See, for example, ***Mann, Harnek Singh*** **v.** ***M.E.I.*** **(IAB 85-6199), Wlodyka, June 5, 1987.**

[233] See, for example, ***Mann, Kirpal Singh*** **v.** ***M.E.I.*** **(IAB 86-6008), Mawani, Gillanders, Wlodyka, April 14, 1987.**

[234] ***Ahlwat, Balbir Singh*** **v.** ***M.E.I.*** **(IAD V91-00896), Wlodyka, Verma, Arpin, May 13, 1993.**

Therefore, even if a marriage has been registered and a certificate presented, if registration is challenged and other evidence on the record about the marriage ceremony is confused, inconsistent and full of contradictions, it may be found that the sponsor has failed to prove that a valid marriage took place. If the sponsor fails to prove the validity of the marriage, then the applicant is not the spouse of the sponsor and therefore not a member of the family class even if they went through an engagement ceremony prior to the alleged marriage.[238]

5.3.3 Declaratory judgments

Little weight may be given to an *ex parte* judgment *in personam*[239] purporting to establish the marriage in question where the record shows that the evidence before the issuing court was incomplete and where the evidence on appeal indicates that the sponsor was married to another person and therefore lacked the capacity to marry his purported wife.[240]

Little weight may also be given to a declaratory judgment by a court where the judgment fails to refer to the date and place of the marriage in question and where the judgment is obtained after the applicant has received the letter of refusal.[241]

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[235] ***Parmar, Ramesh Kumar* v. *M.E.I.* (IAB 85-9772), Eglington, Weisdorf, Ahara, September 12, 1986.**

[236] ***Kaur, Gurmit* v. *C.E.I.C.* (F.C.T.D., no. T-2490-84), Jerome, May 8, 1985.**

[237] ***Supra***, footnote235, at page 15.

[238] ***Lotay, Harjit Kaur* v. *M.E.I.* (IAD T89-03205), Ariemma, Townshend, Bell, April 18, 1990.**

[239] An ***in personam*** judgment is one that binds only the two persons to an action.

[240] ***Gill, Sakinder Singh* v. *M.E.I.* (IAD V89-01124), Gillanders, Verma, Wlodyka, July 16, 1990.**

[241] ***Burmi, Joginder Singh* v. *M.E.I* (IAB 88-35651). Arpin, Sherman, Weisdorf, February 14, 1989.**

5.3.4 Essential Validity

Essential validity includes matters relating to consent to marry, existing prior marriage, prohibited degrees of relationship and non-consummation of marriage.[242]

Where essential validity is in issue such as when the sponsor is found to lack the capacity to marry the applicant at the time of their marriage because the sponsor's divorce decree relating to his first marriage has not been made absolute, the Appeal Division's jurisdiction does not extend to amending an application for permanent residence by a spouse to that of a fiancé.[243]

In cases that raise an issue of essential validity, there is conflicting authority on what law governs; that is, whether it is the foreign law (the law of prenuptial domicile of the purported spouses) or Canadian domestic law (the law of their intended matrimonial home) that should be applied.

While the Federal Court of Appeal sanctioned the application of the law of the intended matrimonial home in the *Narwal* case,[244] it subsequently clarified in its decision in *Kaur* that the law of the intended matrimonial home is to be applied exceptionally, only in "very special circumstances" such as those that existed in *Narwal*; that is; where the marriage had been celebrated in a third country, there was no doubt about the good faith of the spouses, and the spouses had a "clear and indefeasible" intention "to live in Canada immediately and definitely".[245]

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[242] ***Supra***, footnote 229, at page 256.

[243] ***Punia, Bulwant Singh*** v. ***M.E.I.*** **(IAD V92-01594), Gillanders, July 27, 1993**.

[244] ***M.E.I.*** **v.** ***Narwal, Surinder Kaur*** **(F.C.A., no. A-63-89), Stone, Marceau, MacGuigan, April 6, 1990**.

[245] ***Kaur, Narjinder*** v. ***M.E.I.*** **(F.C.A., no. A-405--89), Marceau, Desjardins, Linden, October 11, 1990**, at page 5.

The Court was not prepared to apply the law of the intended matrimonial home where the marriage had been celebrated in India, the *bona fides* of the marriage was in question, and no effect could be given to the intention of the spouses to live in Canada because the applicant had been previously deported and was prohibited from coming into Canada without a Minister's permit. The law of the prenuptial domicile was the proper law to apply to such facts.[246]

5.4 Exemption from strict compliance with law

In cases involving the application of foreign law such as the *Hindu Marriage Act, 1955*, it may be alleged that custom or usage exempts the purported spouses, who fall within the prohibited degrees of relationship, from strict compliance with that Act. However, where the sponsor claims to be the spouse of the applicant by reason of an exemption to the law based on custom or usage, the sponsor has the onus of clearly proving its existence.[247] A declaratory, *in personam* judgment, which rules on the existence of the custom or usage in issue, may be considered to be evidence of its existence.[248] The testimony of an expert witness,[249] even a transcript of the testimony of an expert witness in another hearing, may be accepted as establishing the existence of a custom.[250]

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[246] ***Ibid.***

[247] ***M.E.I.* v. *Taggar* [1986] 3 F.C. 576; 60 D.L.R. (4th) 431 (C.A.).**

[248] ***Ibid.***

[249] ***Atwal, Jaswinder Kaur* v. *M.E.I.* (IAB 85-4204), Petryshyn, Wright, Rayburn, January 30, 1989.**

[250] ***Bhullar, Sawarnjit Kaur* v. *M.E.I.* (IAD W89-00375), Goodspeed, Rayburn, Arpin (concurring), November 19, 1991.**

CHAPTER 5

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CHAPTER 6

7. MARRIAGES AND ENGAGEMENTS OF CONVENIENCE

7.1. *The Legislative Framework*

7.1.1. Marriages of Convenience

A qualified sponsor may sponsor an application for permanent residence made by a member of the family class. Section 2 of the *Immigration Regulations, 1978* (the "Regulations") includes as one of the members of the family class "the sponsor's spouse". However, a sponsored spouse is expressly excluded from the family class if the spouse is caught by section 4(3) of the Regulations. This provision states:

> *4(3) The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse.*

7.1.2. Engagements of Convenience

Section 2 of the Regulations also includes as a member of the family class "the sponsor's fiancée." There is no provision corresponding to section 4(3) of the Regulations that expressly excludes a sponsored fiancée from the family class if it is found that the engagement is one of convenience. Section 6(1)(d)(i) of the Regulations is analogous to section 4(3) in substance, but not in effect Section 6(1)(d)(i) imposes certain conditions for the issuance of an immigrant visa; namely that a visa officer may, subject to certain other provisions, issue a visa to a fiancée if:

> ...
>
> *(i) the sponsor and the fiancée intend to reside together permanently after being married and have not become engaged primarily for the purpose of the fiancé(e) gaining admission to Canada as a member of the family class ...*

7.2. *The Jurisprudence*

7.2.1. The Tests

7.2.2. Marriages of Convenience

Section 4(3) of the Regulations imposes a double or two-pronged test. An application for permanent residence cannot be refused on the basis of section 4(3) unless it is found "that there is both a marriage entered into by the sponsored spouse primarily for purposes of immigration and lack of intention on his or her part to live permanently with the other spouse."[251] This means that a spouse must be caught by both prongs of the test to be excluded from the family class.[252]

The onus is not on the Minister to demonstrate that the visa officer's refusal of the sponsored application for permanent residence was correct.[253] The onus is on the sponsor to prove that the applicant is not caught by the two-pronged test in section 4(3)[254].

In deciding whether or not the applicant has the intention of residing permanently with the sponsor, a panel must examine the applicant's intentions, not the sponsor's beliefs or intention.[255]

The sponsor's belief that the applicant intends to live with the sponsor permanently is not determinative of the issue. The panel's "prime task" is to test that asserted belief against the relevant facts to ascertain whether or not it can be supported objectively.[256]

An appeal under section 77 is not a judicial review in which the validity of the refusal may be considered only on the basis of the material that was before the Immigration Officer. Therefore, additional evidence which was not before the immigration officer may be taken into account.[257] However, where the sponsor gives evidence about the applicant's intention and the sponsor is found to be lacking in credibility, no weight may be given to that evidence. What may form the basis for finding that the applicant lacked the requisite intention is the applicant's attitude as discerned from the record of the interview with the immigration officer.[258]

When the only other evidence presented on the issue of the applicant's intention is the sponsor's evidence, the interviewing visa officer has not directly questioned the applicant or adduced other relevant, objective evidence and the applicant could give evidence relevant to the issue, but fails to do so, "it is not unreasonable to draw an adverse inference as to the applicant's lack of the relevant intention.[259]

In interpreting the meaning of 'primarily' in the first prong of the section 4(3) test, one Immigration Appeal Board panel has looked to the definition given in the Concise Oxford Dictionary, that is, "of the first importance, chief." Applying that definition, the panel held that it had to examine all of the reasons for the marriage and be convinced that the objective of gaining admission to Canada was "the dominant driving force" for the marriage before it could determine that the applicant was caught by that prong.[260]

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[251] *Horbas* v. *M.E.I.* **[1985] 2 F.C. 359 (F.C.T.D), at page 365.**

[252] *Parmar, Ramesh Kumar v. M.E.I.* **(IAB 85-9772), Eglington, Weisdorf, Ahara, September 12, 1986.**

[253] *M.C.I. v. Heera, Lilloutie* **(F.C.T.D., no. IMM-5316-93), Noël J., October 27, 1994.**

[254] *S.G.C. v. Bisla, Satvinder* **(F.C.T.D., no. IMM-5690-93), Denault J, November 28, 1994.**

[255] *Ibid* **254.**

[256] *Heera, supra*, **footnote 253, at page 1.**

[257] *Kahlon* v. *Canada (M.E.I.)* **(1989), 7 Imm. L.R. (2d) 91 (F.C.A).**

[258] *Rattan, Sushmendra Kaur v. M.E.I.* **(F.C.T.D., no. IMM-28-93), Reed J., January 19, 1994.**

[259] *Brar, Kuljit Singh v. M.C.I.* **(IAD V93-02858), Clark, March 13, 1995, at page 5.**

Even where the sponsor admits that her ability to sponsor a spouse makes her more attractive to a potential spouse abroad, including the applicant, if the evidence establishes, on a balance of probabilities, that the relationship is not based solely on this factor, then the applicant is not caught by section 4(3).[261]

Although section 4(3) sets out a double or two-pronged test, evidence relevant to the primary purpose for the marriage can also be relevant to the assessment of intention to reside permanently with the sponsor.[262]

The immigration officer must address both prongs of the test in section 4(3). The reason for this requirement is that it is sufficient to successfully challenge the validity of the refusal in law if the applicant is able to establish either that the applicant did not enter into the marriage primarily to gain admission to Canada or that the applicant intends to reside permanently with his or her spouse. Thus, for example, if the visa officer has failed to turn his or her mind to the applicant's intention as to residing permanently with the sponsor, then the officer has erred in law.[263]

In light of the decision of the Federal Court of Appeal in *Singh (Pal)*[264], there is no requirement for the refusal letter to refer specifically to both prongs of the section 4(3) test as long as the letter refers to section 4(3) in full and the record indicates that the immigration officer considered both of them.[265]

7.2.3. Engagements of Convenience

Subject to certain other provisions, section 6(1)(d)(i) of the Regulations imposes two requirements which must be met before a visa officer may issue an immigrant visa to a fiancée: first, the sponsor and fiancée must intend to reside together permanently after marriage and second, they must not have become engaged primarily to gain the fiancee's admission to Canada.[266] Thus, if either branch of the test in section 6(1)(d)(i) is not met, the issuance of an immigrant visa to a sponsored fiancée is precluded.

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[260] *Singh, Ravinder Kaur* v. *M.E.I.* **(IAB 86-10228), Chu, Suppa, Eglington (dissenting), August 8, 1988, at page 5.**

[261] *Shinh, Anita v. M.C.I.* **(IAD T94-02427), Wiebe, October 4, 1995.**

[262] *Bisla, supra*, **footnote 254.**

[263] *Parmar, supra*, **footnote 252.**

[264] *Singh (Pal): M.E.I.* v. *Singh (Pal)* **(1987), 35 D.L.R. (4th) 680 (F.C.A.).**

[265] *Haneef, Mohammed v. M.E.I.* **(IAB 86-4170), Mawani, Goodspeed, Vidal, November 23, 1987.**

[266] *Jung, Harry Kam v. M.E.I.* **(IAB 84-6237), D. Davey, Chambers, Anderson, May 17, 1985, at pages 4-5; applied in** *Budnick, Joseph v. M.E.I.* **(IAB 86-4090), Vidal, Goodspeed, Eglington, September 16, 1986. See also** *Sandhu, Daljit Kaur v. M.E.I.* **(I.A.B. 87-6347), Mawani, October 20, 1987.**

In applying the section 6(1)(d)(i) test, the intention of both the sponsor and the applicant has to be ascertained[267], as regards both branches of the test.

7.3. ASCERTAINING PURPOSE AND INTENTION: THE CRITERIA

The application of the tests in section 4(3) "raise difficult questions of fact, the more so because they involve the assessment of the intention of the sponsored spouse."[268] This is likewise true in applying the tests of intention for the sponsor and sponsored fiancée in section 6(1)(d)(i). In evaluating these questions, panels have considered evidence of the following criteria.

7.3.1. Inconsistent or contradictory statements

Where there are significant discrepancies between the information that the sponsor provides to the immigration officer and the information that the applicant [spouse or fiancé(e)] gives to the visa officer abroad about such matters as the origin and development of the relationship between the couple, this may arouse suspicion and form the basis of a refusal of the sponsored application for permanent residence. On appeal, if the sponsor is unable to explain satisfactorily the discrepancies and fails to adduce additional evidence to persuade the panel that the marriage or engagement is one of substance, then the sponsor may not succeed.[269]

Procedural fairness does not require an immigration officer to give to spouses the opportunity to respond to discrepancies in the evidence they have presented in their separate interviews.[270]

7.3.2. Previous attempts by applicant to gain admission to Canada

Relevant, though not necessarily decisive, is the applicant's history of previous attempts to gain admission to Canada. For example, one Immigration Appeal Board panel considered a false refugee claim by an applicant and marriage shortly after the claim had been refused to be material facts in the context of a section 4(3) refusal.[271]

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[267] *Sidhu, Kulwant Kaur v. M.E.I.* **(IAB 88-35458), Ahara, Rotman, Eglington (dissenting), August 25, 1988.**

[268] *Horbas, supra,* **footnote 251, at page 368.**

[269] *Dhaliwal, Parmjit Singh v. M.E.I.* **(IAB 86-6355), Anderson, Chambers, MacLeod (concurring in the result), June 16, 1988.**

[270] *Dasent: M.C.I. v. Dasent, Maria Jackie* **(F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996, resolving the conflicting jurisprudence in earlier decisions such as:** *Grewal, Bhajan Singh v. M.E.I.* **(F.C.T.D., no. T-1505-92), Noël, March 17, 1993;** *Adebiyi v. Canada (M.E.I.)* **(1994), 73 F.T.R. 230**; Singh, Ramesh v. M.E.I. **(F.C.T.D., no. T-2011-92), Pinard, October 8, 1993;** *Ellis v. Canada* **(M.E.I.) (1994), 27 Imm. L.R. (2d) 124 (F.C.T.D.)**; *Dhaliwal, Gurpal Singh v. M.E.I.* **(IAD V92-01211), Wlodyka, July 22, 1993; and** *Ramoutar, Ramdeo* v. *M.E.I.*, [1993] 3 F.C. 370 (F.C.T.D.).

An adverse inference was drawn in one case from the fact that the applicant had claimed, but was refused refugee status, married following the refusal, and then had no fear in returning to his country where he lived without any consequence.[272]

However, on somewhat similar facts, in particular prior attempts to gain admission to Canada, another panel concluded that the steps that the applicant had taken and applications he had made were evidence of his desire to remain in Canada, but did not constitute conclusive proof that the marriage was primarily for immigration purposes. In the panel's opinion, the applicant's efforts to remain in the country were not to be viewed in isolation from other factors surrounding the marriage and there was "sufficient evidence based on the conduct of the parties, both before and after the marriage" to conclude that the marriage was not one of convenience.[273]

Faced with the issue of whether or not the sponsor and applicant were fiancés of convenience, one panel has taken the same approach in deciding what, if any, weight to give to a previous application for permanent residence by the applicant. The panel concluded that such an application showed an interest in admission to Canada, but that it did not, in itself, establish that the applicant had become engaged primarily to achieve that objective.[274]

Where in one case the marriage between the sponsor and applicant appeared stable, there was one child of the marriage and another soon to be born, the applicant provided for the needs of his family and the sponsor considered the applicant to be a good husband and father, the panel attributed the applicant's extreme reluctance to candidly reveal past events in his life, including efforts to gain admission to Canada, to a fear of compromising his family's future and presumed that he was acting in good faith.[275]

In another case, where the sponsor had attempted to bring his fiancée to Canada first as a visitor, then as an assisted relative and finally as a fiancée, the panel noted that a "superficial glance" at the record might not favour a finding of a genuine fiancé relationship. However, the panel accepted the sponsor's explanation that he wanted to be more cautious in view of a previous sponsorship of a wife whom he discovered later had only been after his money.[276]

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[271] *Singh, Muriel* v. *M.E.I.* **(IAB 86-1098), Angé, Cardinal, Lefebvre, January 8, 1987.**

[272] *Kane, Carole* v. *M.E.I.* **(IAB 86-1098), Cardinal, P. Davey, Lefebvre, January 7, 1987.**

[273] *Sandhu, Corazon Dalmacio Compos* v. *M.E.I.* (IAB 86-4082), Rayburn, Goodspeed, Arkin, April 7, 1987, **at page 6; applied in** *Malik, Estelita* v. *M.E.I.* (IAB 86-4271), Rayburn, Goodspeed, Petryshyn, April 11, 1988.

[274] *Jung, supra,* **footnote. 266.**

[275] *Birdi, Denise Marie Irène* v. *M.E.I.* **(IAD M89-02491), Durand, Blumer, Angé, May 14, 1990.**

[276] *Budnick, supra,* **footnote 266.**

One panel took into account, and drew an adverse inference from, the applicant's immigration problems, that is, his having overstayed a visitor's visa and his failure to voluntarily depart Canada in accordance with his implied undertaking, as well as his not having disclosed those problems to the sponsor until two weeks after the couple had become engaged and he had moved into her apartment.[277]

The applicant's tenuous status in Canada was also considered by another panel to have probative value and an adverse impact on the sponsor's case where the sponsor and applicant saw each other casually off and on and only decided to marry after the applicant's arrest prior to his immigration inquiry.[278]

Where one panel found an elaborate scheme between the families of the sponsor and applicant to facilitate their admission to Canada, the panel did not find persuasive evidence as to the duration and consummation of the marriage and the birth of a child.[279]

7.3.3. Previous marriages

In certain circumstances, a previous marriage of convenience by a sponsor may adversely affect the sponsor's case on appeal. The failure of the sponsor and his sister, for example, to provide explanations to clear up aspects of the sponsor's relationship with his first wife led the panel in one case to believe that the sponsor's first marriage was one of convenience. While acknowledging that the first marriage was not directly of consequence in the appeal before it and that the sponsor's second engagement and sponsorship were possibly in good faith, the panel concluded that "the credibility of the sponsor and his sister [had] not been enhanced by their failure to answer satisfactorily repeated questions about this first marriage."[280]

In another case, where the sponsor had previously entered into a marriage of convenience which ended in divorce and the applicant made misrepresentations about material facts such as the sponsor's previous marriage to his first cousin, the panel concluded that the second marriage was entered into primarily for immigration purposes and that the applicant did not intend to reside permanently with the sponsor.[281]

In a case where the sponsor had previously twice married and divorced and the applicant denied any knowledge about "[t]he nuptial propensities" of the sponsor, the panel was not prepared to conclude that the marriage had been arranged to facilitate the applicant's admission to Canada in view of the fact that a child had been born of the marriage.[282]

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[277] *Lewis, Yvonne Theresa v. M.E.I.* **(IAB 86-9535), Weisdorf, Fatsis, Ariemma, March 10, 1987.**

[278] *Chaikosky, Marianne v. M.E.I.* **(IAB 84-4156), Petryshyn, Hlady, Voorhees, June 7, 1985.**

[279] *Sidhu, Jaswinder Kaur v. M.E.I.* **(IAD V92-01035), Ho, September 2, 1994.**

[280] *Dhaliwal, supra*, **footnote 269, at page 5.**

[281] *Sidhu, Jaswinder Kaur v. M.E.I.* **(IAD V89-00201), Wlodyka, Chambers, Singh, March 13, 1990.**

[282] *Sandhu, Jaspal Kaur v. M.E.I.* **(IAD T89-05181), Ariemma, Arkin, Weisdorf, April 3, 1990.**

Faced with a situation where a sponsor and applicant had married, divorced and then remarried following the refusal of the applicant's refugee claim, the majority of the panel in that case examined the relationship of the couple as a whole. The panel then concluded that "the legal recognition of the marriage [that is the second marriage] can be said to have been entered into by the applicant possibly for immigration purposes [but that] the substance of the marriage had been in existence all along and can be said to have been entered into not for purposes of immigration."[283]

In another case, it appears to have weighed rather heavily against the sponsor that the applicant had sent her a love letter one month, but married another woman the next.[284]

7.3.4. Arranged marriages

The practice of arranged marriages does not in itself call into question the good faith of the spouses as long as the practice is customary in their culture. Where an arranged marriage is found to be part of customary law, this supports a finding that an applicant's primary intention in marrying the sponsor is not to gain admission to Canada as well as a finding that the applicant did have the intention to reside permanently with the sponsor if admitted to Canada.[285]

7.3.5. Mutual Interest

7.3.5.1. Knowledge about the other

One of the basic indicators of mutual interest between the sponsor and applicant is knowledge about each other. However, the application of this criterion tends to vary according to the nature of the marriage, that is whether or not the marriage was arranged by the families of the couple.

On the facts before them, one panel, for example, found a scarcity of such knowledge and furthermore, a lack of effort on the part of each to learn about the other. These factors, among others, weighed heavily against the sponsor and applicant.[286]

In another case, the panel found that the sponsor did not have perhaps a great deal of knowledge about the applicant and his family, but that it was consistent with the evidence of an arranged marriage. In addressing whether or not efforts had been made by the couple to get to know about each other, the panel again concluded that "there was no evidence to show that what transpired was inconsistent with the practice of an arranged marriage."[287]

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[283] *Singh, supra,* **footnote 260, at page 8.**

[284] *Guérin, Jeannine* v. *M.E.I.* **(IAB 88-21009), Angé, Blumer, Durand, June 20, 1989.**

[285] *Brar, Baljit Kaur* v. *M.C.I.* **(1995), 29 Imm. L.R. (2d) 186.**

[286] *Sanghera, Jagdeep Singh* v. *M.E.I.* **(IAB 85-6135), Ariemma, Chambers, Singh, January 23, 1987.**

7.3.5.2. Contact between the couple

In ascertaining intention, panels look for evidence suggesting that the sponsor and applicant keep in touch with each other and avail themselves of opportunities to spend time together. To this end, they take into consideration evidence of communication by telephone and by mail, visits, cohabitation, consummation of the marriage, and the sponsor's willingness to emigrate to the applicant's country in the event of an unsuccessful appeal.[288]

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[287] *Sandhu, Daljit Kaur v. M.E.I.* (IAB 87-6347), Mawani, October 20, 1987, at page 8; *Bhangal, Baljit Singh v. M.E.I.* (IAD W90-00173), Goodspeed, December 6, 1991.

[288] See, for example: *Sanghera, supra*, footnote 286,where the panel took into consideration the telephone calls between the fiancés. Over an approximately five-year period, the panel found that at best, four or five calls had been exchanged. The panel appears to have drawn an adverse inference from the infrequency of the calls as well as the sponsor's inability to recall more than one topic of conversation from these calls; in the same case, the sponsor testified that the couple did not correspond due to the lack of a common written language, but that their parents exchanged letters on occasion; however, the panel noted to the sponsor's detriment that he was not aware of the contents of the letters and that he did not adduce any copies of the letters in evidence; *Virk v. M.E.I.* (1988), 2 Imm. L.R. (2d) 127, where constant communication by letters between the couple was viewed as positive factor; *Lewis, supra*, footnote 277, at pages 5-7, where the sponsor testified that her spouse, the applicant, sent her about three letters a month, but only produced one of them at the hearing of her appeal; the panel concluded that the letter was intended to be representative of all the letters she had received from her husband and that she had introduced it as an indication of her husband's feelings for her; on the basis of the letter and the other evidence adduced, the panel concluded that the applicant was "an example of the quintessential user of people" and that the motive for a marriage of convenience existed; as to the letter, the panel found that the sponsor's "own written words provide[d] cogent, if circumstantial, evidence of his intention;" *Coolen, Andrea Van v. M.E.I.* (IAB 84-9741), D. Davey, Benedetti, Petryshyn, October 2, 1985, where in ascertaining whether or not there was an intention to reside permanently with the other spouse, the panel took into consideration that "neither the appellant nor her spouse had the intention nor the commitment to spend time that was available at holidays or vacation time together;" *Parmar, supra*, footnote 252 at page 19, where the panel found that the applicant's intention to reside permanently with the sponsor was supported by evidence on the basis of which it could not be said "that opportunities for physical union [had] been passed up;" this same panel inferred consummation of the marriage from the fact of cohabitation; *Sandhu, supra*, footnote 273, where the panel inferred consummation of the marriage from the birth of a child whose birth certificate indicated that the applicant was the natural father; *Robinson, Audrodin v. M.E.I.* (IAB 87-9093), Arpin, Rotman, Suppa, June 23, 1987, where the panel considered significant the unrefuted evidence that on one of her visits to Jamaica the sponsor did not stay with her husband, but with a friend; *Chaikosky, supra*, footnote 278, where the panel found that it was not in the couple's favour that they had never cohabited as man and wife and concluded on that basis that the applicant had no intention of residing permanently with the sponsor; in evaluating the *bona fides* of the relationship, the panel also took into account whether or not the sponsor would be willing to emigrate to join his/her spouse in the event of an unsuccessful sponsorship attempt.

7.3.5.3. Family ties

Depending on the cultural context, panels will focus on family ties, contact between the couple and their respective in-laws[289] and the presence of members of both families at engagement and marriage ceremonies.[290]

7.3.5.4. Support and exchange of gifts

In relation to certain cultural contexts, the exchange of gifts[291] and financial support[292] have been viewed favourably by panels as indicators of the requisite intention for a genuine relationship. Thus where the sponsor's only source of income was social assistance benefits and her spouse, the applicant, was a wealthy businessman in his country who had assets in Canada, and there was no evidence that the applicant paid monthly support to the sponsor, the panel appears to have drawn an negative inference about the sponsor's intentions.[293]

7.3.5.5. Delay in submission of sponsorship application

One panel concluded that where the sponsor and applicant have married and the visa officer knows of the marriage at the time of the interview, the fact that they delayed marrying for two years after becoming engaged was not sufficient to found either or both conclusions that the applicant's primary purpose in marrying was to gain admission to Canada or that the applicant did not intend to reside permanently with the sponsor.[294]

Another panel concluded that delay in submitting the sponsorship application was not a significant factor in repudiating the *bona fides* of the relationship between the fiancés in that case because even if the engagement were one of convenience, "the parties would not wish to delay the sponsorship application unduly, the ultimate aim presumably, in both instances, being to get the applicant into Canada as soon as possible."[295]

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[289] *Sandhu, supra*, **footnote 273;** *Virk, supra*, **footnote 288.**

[290] *Supra*, **footnote 278, where the panel noted that there were no members from either side of the family at the civil marriage ceremony even though some of them lived in the same city where the ceremony had taken place.**

[291] *Sandhu, supra*, **footnote 273.**

[292] *Virk, supra*, **footnote 288.**

[293] *Beepat, Charandai Bisnath v. M.E.I.* **(IAB 86-9207), Fatsis, Arpin, Ariemma, January 22, 1987.**

[294] *Sidhu, supra*, **footnote 279.**

[295] *Sandhu*, **footnote 287, at pages 7-8.**

7.3.6. "Compatibility"

On the issue of compatibility generally, the panel in one case stated that it found offensive the visa officer's application of what it considered to be a mythical standard. The standard in question was "a spousal relationship, as it is normally understood ... based on the compatibility of two persons as marital partners." In the opinion of the visa officer, the sponsor and applicant were incompatible since they did not share the same religious beliefs and background.[296]

The panel criticized the application of such a standard in the following terms:

> *It almost goes without saying that individuals with differences in religious beliefs and backgrounds regularly marry in Canada, and are not normally deemed, by virtue of that factor alone, to be incompatible as a married couple. The conclusion reached by the visa officer that a permanent marital relationship was not contemplated appears to have been based solely on his questionable definition of a normal spousal relationship.*[297]

In a later case, referring to incompatibility by reference to cultural norms as a factor raising suspicions in the mind of a visa officer, the panel pointed out that a mere listing of incompatibilities would not ordinarily establish inadmissibility under section 4(3) of the Regulations. In the words of the panel:

> *No matter how incompatible persons may be within the customs and practices of their own community, they may still be genuinely committed to each other and to the marriage. This evidence simply does not get to the issue of the intention of the applicant. It is not in itself other objective evidence which tends to prove that lack of the requisite intention on the part of the applicant which is necessary to reach a finding that he or she is inadmissible under section 4(3).*[298]

In deciding upon the validity of refusals where incompatibility has been alleged, panels have had to examine differences in religion,[299] education and language,[300] and age.[301]

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[296] *Sandhu, supra*, footnote 273, at page 5.

[297] *Sandhu, supra*, footnote 273, at pages 5-6.

[298] *Brar, supra*, footnote 259, at page 5.

[299] See, for example, *Kane, supra*, footnote 272, where the panel concluded that the fact that the sponsor and her spouse were not of the same religion could not support a refusal under section 4(3); *Sandhu, supra*, footnote 273, where the panel endorsed the same view and took into consideration evidence that the sponsor and applicant did not perceive differences in their religions to be problematic as they respected each other's religion and attended each other's place of worship together.

[300] See, for example, *Dhillon, Gurprit Singh v. M.E.I.* (IRB 89-00571), Sherman, Ariemma, Tisshaw, August 8, 1989, where the panel acknowledged that incompatibility in education and language alone were generally insufficient to found a refusal, but took them into consideration, together with other factors such as the sponsor's lack of knowledge about his spouse's background, to conclude that the marriage was one of convenience; see, however, *Chaikosky, supra*, footonote 278, at page 6, where the panel found the relationship between husband and wife to be "tenuous due to a severe language barrier."

The caselaw indicates that no single criterion is decisive. It is the interplay of several factors that leads a panel in any given case to make a finding as to the purpose for, and intentions in respect of, a marital relationship or a relationship between fiancés.[302]

7.4. ASCERTAINING PURPOSE AND INTENTION: TIMING

Section 4(3) defines a spouse excluded from the family class as one "who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse". The relevant time for determining the applicant's intention is the time of entering into the marriage."[303]

Conversely, where the evidence reveals that the sponsor's marriage to the applicant was contracted in good faith, a subsequent separation with no possibility of a reconciliation can in no way alter the original character of the marriage, the sponsorship or the application for permanent resident status.[304]

7.5. SPECIAL RELIEF

Subject to certain other provisions, if the conditions in section 6(1)(d)(i) are met, a visa may be issued to a fiancé(e); otherwise, it may not. This does not mean, however, that the fiancé(e) is then excluded from the family class as in the case of a spouse caught by section 4(3).

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[301] See, for example, *Jung, supra*, footnote 266, where the panel concluded that a significant difference in page, though relevant, did not by itself establish that the sponsor and applicant had become engaged primarily for immigration purposes; *Parmar, supra*, footnote 252, at pages 19-20, where the panel stated that it could not ignore the expectations of the applicant who was a Hindu woman over 30 years of age living in India: "It might well be thought reasonable to infer that a bride in the applicant's position would fully intend to make the most of her opportunity and create a lasting and permanent union with a husband who had presented himself to her in a sense, fortuitously" [the husband in question was 12 years younger than the applicant]; *Guérin, supra*, footnote 284, where despite an age difference of 36 years between the sponsor and her spouse, the panel emphasized that this gap in years was not critical to its decision even though the sponsor herself raised it constantly throughout her testimony.

[302] See, for example, *Sidhu, Gurdip Singh v. M.E.I.* (IAD W90-00023), Goodspeed, Arpin, Rayburn, September 12, 1990, where the panel gave little or no weight to evidence of differences in age and education in view of evidence of other important factors in arranging a traditional Sikh marriage.

[303] See, for example, *Singh, Ranjit Kaur v. S.S.C.* (I.A.D. T93-07239), Channan, Aterman, Ramnarine, July 29, 1994, where the panel held that marriage and subsequent birth of a child do not in themselves demonstrate the intention of the applicant *at the time of the marriage* (emphasis added); the dissenting reasons in *Salh, Surinder Kaur v. M.E.I.* (87-9964), MacLeod, Chu, Townshend (dissenting), February 12, 1988, at page 7; and *Singh, supra*, footnote 260, where the dissenting Member stated that: "The intention, or rather the absence of the prescribed intentions, at the time of application, at date of immigration interview, at date of refusal or date of appeal hearing, is not the issue. Only the state of intention at the time the marriage was contracted can be used in the application of subsection 4(3)...".

[304] *Marquis, Isabella v. M.E.I.* (I.A.D. M90-03412), Blumer, Angé, Durand, October 23, 1991.

To be or not to be a member of the family class has one significant consequence. On appeal from a refusal of a sponsored application for permanent residence, provided that the applicant spouse or fiancé(e) is a member of the family class, the panel may consider granting special relief having regard to compassionate or humanitarian considerations, even if it finds the refusal valid in law.[305] If an applicant is not a member of the family class, however, a panel may not grant special relief as to do so would expand beyond the members of the family class.[306] Thus, the exercise of special relief is precluded for the spouse caught by section 4(3), but it is not for the fiancé who is unable to meet the conditions in section 6(1)(d)(i).

7.5.1. Marriages of Convenience

Where there were two grounds of refusal, one based on the applicant's failure to obtain the Minister's consent to come to Canada as required by section 57 of the *Immigration Act, 1976* (now section 55 of the *Immigration Act)* and the other based on section 4(3) of the Regulations, the panel found the ground of refusal based on section 57 of the Act to be valid in law, and it went on to consider whether or not the section 4(3) ground of refusal was valid. Having determined that it was and that the spouse was therefore not a member of the family class, the panel held that it had no jurisdiction to grant special relief.[307]

7.5.2. Engagements of Convenience

Although it would be highly unlikely that a panel would grant special relief in favour of a sponsor after concluding that the engagement was one of convenience, the right to appeal on compassionate or humanitarian grounds exists nonetheless.[308]

7.6. CHANGE IN MARITAL STATUS

A complex issue is how to deal with an application for permanent residence of a fiancé(e) who marries his or her sponsor at some time during the processing of the application or later. The caselaw indicates that the resolution of that issue depends, in part, on the timing of the change in marital status.

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[305] *Chaikosky, supra,* **footnote 278.**

[306] *Garcia, Elsa v. M.E.I.* **(IAB 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979.**

[307] *Chaikosky, supra*, **footnote 278.**

[308] *Dyal, Rapinderjit Kaur v. M.E.I.* **(IAB 87-6066), Wlodyka, Anderson, Gillanders, April 25, 1988;** *Bhangal, Baljit Singh v. M.E.I.* **(IAD W90-00173), Goodspeed, December 6, 1991;** *Shergill, Gurdawar Singh v. M.C.I.* **(IAD V94-00986), McIsaac, November 30, 1995.**

7.6.1. Marriage after filing of undertaking of assistance but before filing of application for permanent residence

Relying on the Federal Court of Appeal decision in *Owens*,[309] a panel held that "marital status is to be determined at the date the applicant swore to the truth of the contents of the application for permanent residence." Thus where the application indicated that the applicant was married, the panel decided to treat the application as that of a spouse rather than fiancé(e) notwithstanding that a second refusal letter based on section 6(1)(d)(i) had been sent to the applicant with a postscript that it superseded the first refusal letter based on section 4(3). The sponsor had launched his appeal after receiving the refusal letter referring to section 4(3) and the panel held that "[i]t would be contrary to fairness and natural justice for the Appeal Division to hear [the] case as an appeal from a fiancé refusal because such ground of refusal was not disclosed to the appellant prior to his lodging this appeal."[310]

Where the sponsor married his/her fiancé(e) after the filing of the undertaking of assistance, but before the filing of the application for permanent residence and the application itself indicated that the applicant was the sponsor's spouse, one panel held that the visa officer ought to have assessed the application as one submitted by a spouse rather than a fiancé(e). On that basis, the panel found that the visa officer had erred and that the refusal was invalid in law.[311]

In another case, the applicant had sworn to the truth of the contents of her application for permanent residence which indicated that she was engaged at a time when she was married. The application had not been amended to reflect the change in marital status though the visa officer treated the application as one by a spouse. The panel considered the failure to amend the application as an error of form and not of substance.[312]

7.6.2. Marriage after filing of undertaking of assistance and application for permanent residence but before refusal of application

Following the decision of the Federal Court in *Gurmit Kaur*,[313] one panel decided that where an undertaking of assistance and application for permanent residence are filed at a time when the applicant is the sponsor's fiancé, the validity of a subsequent marriage before the refusal of the application is irrelevant; the visa officer ought to have assessed the applicant as a fiancé and moreover, the applicant should not have been required to file a new application for permanent residence. The panel therefore found the refusal not to be in accordance with the law.[314]

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[309] *Owens, Christine Janet v. M.E.I.* **(F.C.A. no. A-615-83), Urie, LeDain, Marceau, March 27, 1984.**

[310] *Dhillon, supra*, **footnote 300, at pages 2-3.**

[311] *Gill, Balbir Kaur v. M.E.I.* **(IRB 88-00074), Wlodyka, MacLeod, Verma, February 7, 1989.**

[312] *Dhaliwal, Gurmail Singh v. S.S.C.* **(IAD T93-08796), Aterman, Channan, Teitelbaum, June 2, 1994.**

[313] *Re Gurmit Kaur v. C.E.I.C. et al.* **(F.C.T.D., no. T-2490-84), Jerome, May 8, 1985.**

7.6.3. Marriage after refusal but before hearing of appeal

Relying on *Gurmit Kaur*,[315] a panel held that the initial application by a fiancée was to be dealt with entirely without reference to the validity of the subsequent marriage. The panel noted that there was no issue as to the validity of the marriage in the case before it and found that the marriage of the applicant to his fiancée (the sponsor) subsequent to the refusal did not in itself render the applicant "incapable of meeting the requirements of the Regulations, as a fiancé." Therefore, the panel concluded that it had before it an appeal in respect of a fiancé application. The panel emphasized that its approach to the Regulations was determined by the context, that is, the existence of a fiancé rather than spousal application.[316]

However, in the *Bachittar Singh* case, one panel member evaluated the refusal of the application as that of a fiancé rather than spouse despite a subsequent marriage. The other two Members of the panel held in concurring reasons that the relevant provision of the Regulations ceased to be section 6(1)(d)(i) and became section 4(3) in the situation where the sponsor had married his fiancé following the refusal of her application for permanent residence, but before the hearing of the appeal. In arriving at this conclusion, the panel reasoned that it would be illogical to proceed otherwise once it had decided that the application for permanent residence was to be considered valid.[317] In a later decision, one panel allowed, on consent, the Minister's motion to amend the ground of refusal to refer to a spouse rather than a fiancée.[318]

7.6.4. Marriage after commencement but before completion of hearing of appeal

In dealing with an appeal from a refusal of the sponsored application for permanent residence of a fiancée who married her sponsor after the commencement of the hearing, the majority of the panel in one case noted that the requirements for approval of a spousal application are less stringent than for the approval of a fiancé(e) and that a change in status was not fatal to the application. The majority distinguished *Bachittar Singh*[319] on the basis that in the case before them the marriage had taken place after the commencement of the hearing and held that "[t]he fact that a marriage ceremony [had] taken place [did] not in itself overcome an original refusal, under [section] 6(1)(d)(i) of the Regulations, of the application of the person who was a fiancé(e) and [had] become a spouse". The panel heard the appeal as one from a refusal of an application of a fiancé(e).[320] The majority considered all the evidence, including a life insurance policy in which the sponsor had named the applicant as his beneficiary in the designation of spouse and which had been executed before the sponsor or applicant were informed of the refusal and concluded that there was evidence that a "long association" between the sponsor, applicant and her family had "culminated in the marriage". Moreover, the majority were "reasonably satisfied that a subsisting relationship exist[ed] between them."[321]

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[314] *Dhaliwal, Charanjit Kaur v. M.E.I.* **(IAB 85-6194), Ariemma, Mawani, Singh, May 7, 1987.**

[315] *Re Gurmit Kaur, supra,* **footnote 313.**

[316] *Khella, Kulwinder Kaur v. M.E.I.* **(IRB 89-00179), Singh, Angé, Verma, June 29, 1989, at page 2; see also,** *Bhandhal, Amanpreet Kaur v. M.E.I.* **(IAD T89-06326), Bell, Tisshaw, Townshend, April 4, 1990 in which the panel also applied the** *Kaur* **case,** *supra,* **footnote 313.**

[317] *Singh, Bachittar v. M.E.I.* **(IAB 86-9047), Durand, Eglington, Bell, September 15, 1987.**

[318] *Sidhu,Gurdip, supra,* **footnote 302, in which the panel followed** *Singh, Bachittar, supra*, **footnote 317, and** *Kaila, Daljit Kaur v. M.E.I.* **(IAB 86-4015),Goodspeed, Petryshyn, Rayburn, February 11, 1987.**

[319] *Singh, Bachittar, supra*, **footnote 317.**

The Appeal Division typically views as the critical time for determining marital status the date of the swearing of the application for permanent residence, takes as determinative of the ground of appeal the ground which accords with marital status at that point in time and considers irrelevant the validity of any marriage subsequent to the refusal of a sponsored application of a fiancé(e), but considers in favour of the *bona fides* of the fiancés that they have married if that is consistent with other evidence.[322]

In the context of an appeal from either a section 4(3) or section 6(1)(d)(i) refusal, the sponsor may adduce evidence that was not before the visa officer to demonstrate that the applicant's purpose and intention in respect of a marriage or engagement do not bring the applicant within the purview of the prohibited class invoked. One panel has held, however, that the Appeal Division has no authority for changing the prohibited class:

> *... in the Board's opinion, the decision in* Kahlon[323] *does not, without more, have the effect of converting the application from one of a fiancée to one of a spouse, nor consequently have the effect of automatically converting an appeal from a fiancée refusal to one from a spousal refusal. What it does is to enable the Board to take into account the subsequent marriage of the parties and the circumstances surrounding it and any other evidence which exists at the time of the hearing in reaching its decision. The issue nevertheless remains the inadmissibility of the applicant as a fiancée.*[324]

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[320] *Chow v. Canada (M.E.I).* (1988), 6 Imm. L.R. (2d) 97 (I.A.B.), at pages 100-101.

[321] *Chow, Ibid* 320, at page 103.

[322] See, for example, *Mann, Paramjit Kaur v. M.E.I.* (IAD V89-00516), Chambers, Gillanders, Verma, March 20, 1990; *Bhandal, supra*, footnote 316.

[323] *Kahlon, supra,* footnote 257, where it was held that a hearing of an appeal by the Immigration Appeal Board is a hearing *de novo* in a broad sense. The Court quoted with approval the view of Thurlow, C.J. in *Mohamed v. M.E.I.*, [1986] 3 F.C. 90 (C.A), at page 94 that "the issue to be decided by the Board on an appeal under s. 79 of the Act is not whether the administrative decision taken by a visa officer to refuse an application because the information before him indicated that a person seeking admission to Canada was of a prohibited class was correctly taken but the whole question whether, when the appeal is being heard, the person is in fact one of the prohibited class."

[324] *Gill, Manjeet Singh v. M.E.I.* (IAD V87-6408), Mawani, MacLeod, Verma, August 16, 1989, at page 3.

The panel considered "the intervening marriage as a factor going to the intention of the parties in connection with the fiancée relationship.[325]

Regardless of the weight accorded the marriage in the determination of the validity of the relationship, the marriage may still have some impact in another respect on the issuance of a visa to the applicant. It may create a legal impediment to the proposed marriage under the laws of the province in which the couple intended to reside within the meaning of section 6(1)(d)(ii).[326] However, one panel has stated that "the existence of a potential impediment to the parties going through a marriage in B.C. is largely irrelevant to the issue it has to decide on this appeal". The issue is "essentially one of intention"; namely, whether the fiancée relationship between the applicant and the sponsor is genuine and not one entered into for immigration purposes. The fact that the marriage might cause difficulties in the couple's attempting to marry in Canada is irrelevant to the issue of intention.[327]

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[325] *Gill, Ibid 324.*

[326] *Khella*, *supra*, **footnote 316.**

[327] *Gill, supra*, **footnote 324, at page 6.**

CHAPTER 6

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CHAPTER 7

8. RELATIONSHIP

8.1. generally

The principal applicant(s) must establish that she/he is a member of the family class, and that all of her/his accompanying dependants meet the definition of "dependant."[328]

A refusal based on lack of proof of relationship involves a factual determination made after an assessment of all the evidence. Each case will be decided on its own particular facts. Findings of credibility play a decisive role in the outcome of these appeals.

An applicant may submit false, contradictory or unverifiable documents to prove relationship. A refusal could be justified in circumstances which lead a visa officer to conclude that relationship has not been established. On appeal, the Appeal Division will have the benefit of the sponsor's evidence under oath as well as additional documentary evidence. The visa officer's decision may be overturned in the face of this new evidence.

The starting point for considering a refusal founded on lack of proof of relationship is to look to the definition of the particular relationship which is in issue.

8.2. Not a Member of the Family Class

8.2.1. Jurisdiction

A sponsor has a right of appeal to the Appeal Division only when an application for landing, made by a member of the family class, is refused.[329] Thus, in order for the Appeal Division to accept jurisdiction, the applicant must establish that she/he is a member of the family class. Where the applicant is not a member of the family class, there is also no jurisdiction to consider the granting of special relief based on the existence of compassionate or humanitarian considerations.[330]

For a possible exception to the above principles, in the case of alleged dependants split from the application during processing, please refer to section 7.4.5., "Dependant."

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[328] Subsection 2(1) of the *Immigration Regulations, 1978*.

[329] ***Bailon, Leonila Catillo v. M.E.I.*** **(F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986, QL, [1986] F.C.J. No. 386**, and paragraph 77(3)(a) & subsection 77(1) of the *Immigration Act*.

[330] Paragraph 77(3)(b) of the *Immigration Act*.

8.3. *TIMING*

The definitions relevant to determining whether an applicant is a member of the family class, or a dependant, have been amended over the years. Since the processing of applications for permanent residence can take years, the relevant definitions must be ascertained. In determining which definitions apply, section 11 of SOR/92-101, the *Interpretation Act*,[331] and the Federal Court decisions of ***McDoom***,[332] ***Kahlon***[333] and ***Lidder***[334] should be considered.

Where the undertaking of assistance was filed prior to March 27, 1992, the definitions that were in effect prior to March 27, 1992 continue to apply to the application.[335] However, such applications are still subject to amendments made to other clauses of the *Immigration Regulations, 1978* (the "*Regulations*")[336] after that date.

8.3.1. **History of the Relevant Provisions of the** *Immigration Regulations, 1978*

The definitions of **"dependent son"** and **"dependent daughter"** were created on March 27, 1992.[337] "Dependent son"[338] and "dependent daughter"[339] replaced **"unmarried son"** and **"unmarried daughter,"**[340] and introduced a dependency test. The definition of **"dependant"** was also amended on March 27, 1992, and the provision allowing for "opting out" of dependants was revoked.[341] In addition, section 11 of the amending instrument (SOR/92-101)[342] provided that the former regulations continued to apply to those applications where the undertaking had been filed before March 27, 1992. A panel of the Appeal Division, in applying section 11, has narrowed its application to the changes made by SOR/92-101, in that the applicants were still affected by other, favourable, amendments made to the *Regulations* after that date.[343]

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[331] R.S.C. 1985, c. I-21.

[332] ***McDoom v. M.M.I.*, [1978] 1 F.C. 323 (C.A.).**

[333] ***Kahlon v. M.E.I.* (1989), 7 Imm.L.R. (2d) 91 (F.C.A.).**

[334] ***Lidder v. Canada (M.E.I.)* (1992), 136 N.R. 254, 16 Imm. L.R. (2d) 241 (F.C.A.).**

[335] Section 11 of the amending instrument (SOR/92-101) preserved that right:

> 11. The *Immigration Regulations*, 1978, as they read immediately before the coming into force of these amendments, shall continue to apply in respect of any member of the family class where, before the date of the coming into force of these amendments,
>
> (a) a sponsor residing in Quebec has submitted a form 1344 on behalf of that person to the Minister; or
>
> (b) any other sponsor has given an undertaking to the Minister.

[336] SOR/78-172, as amended.

[337] SOR/92-101.

[338] Subsection 2(1) of the *Immigration Regulations, 1978* provides:

> "dependent son" means a son who

"Member of the family class" is currently defined in subsection 2(1) of the *Regulations*. However, prior to February 1, 1993, the family class was not defined in the definition section of the *Regulations*: section 4 of the *Regulations* described those persons who could be sponsored as members of the family class. On

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> (a) is less than 19 years of age and unmarried,
>
> (b) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and
>
> (i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of his marriage, and
>
> (ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by his parents since attaining 19 years of age or, if married before 19 years of age, the time of his marriage, or
>
> (c) is wholly or substantially financially supported by his parents and
>
> (i) is determined by a medical officer to be suffering from a physical or mental disability, and
>
> (ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting himself by reason of such disability.

[339] Subsection 2(1) of the *Immigration Regulations, 1978* provides:

> "dependent daughter" means a daughter who
>
> (a) is less than 19 years of age and unmarried,
>
> (b) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and
>
>> (I) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, and
>>
>> (ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by her parents since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, or
>
> (c) is wholly or substantially financially supported by her parents and
>
>> (i) is determined by a medical officer to be suffering from a physical or mental disability, and
>>
>> (ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting herself by reason of such disability.

[340] Subsection 4(1) of the *Immigration Regulations, 1978* provided (prior to March 27, 1992):

> ...Every Canadian citizen and every permanent resident may ... sponsor an application for landing made
>
> (b) by his unmarried son or daughter;

[341] For further details, please see section 7.40.50 on dependants.

[342] ***Supra***, footnote 335.

[343] See ***Jiminez v. Canada (M.E.I.)* (1993), 19 Imm.L.R. (2d) 124 (I.A.D)**, where the Appeal Division held that the applicant had to meet the test of "unmarried son" using the new definition of "son."

February 1, 1993,[344] the section 4 provisions regarding who could be sponsored, were transferred to the new definition of "member of the family class."[345]

"Son" and **"Daughter"** were also amended on February 1, 1993[346] to raise the age, by which the applicant must have been adopted, from 13 years[347] to 19 years.[348] This change came into effect in conjunction with amendments to the definition of "adopted."[349]

8.3.2. Determining the Relevant Provision to Apply

The determination of whether an applicant is a member of the family class, is a jurisdictional question. Determining which definition to apply is part of that question. Consequently, the Appeal Division should make its own determination of the issue, and may raise the matter at its own initiative.[350]

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[344] SOR/93-44.

[345] The definition reads in part as follows:

> "member of the family class", with respect to any sponsor, means ...
>
> (b) the sponsor's dependent son or dependent daughter

[346] SOR/93-44.

[347] Prior to February 1, 1993, the definitions read as follows:

> "son" means, with respect to a person, a male
>
> (a) who is the issue of that person and who has not been adopted by another person, or
>
> (b) who has been adopted by that person before having attained thirteen years of age. (emphasis added)
>
> "daughter" means, with respect to a person, a female
>
> (a) who is the issue of that person and who has not been adopted by another person, or
>
> (b) who has been adopted by that person before having attained thirteen years of age. (emphasis added)

[348] Subsection 2(1) of the *Immigration Regulations, 1978* now reads:

"son" means, with respect to a person, a male

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained 19 years of age. (emphasis added)

"daughter" means, with respect to a person, a female

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained 19 years of age. (emphasis added)

[349] For further details, on determining whether the applicant has been "adopted," please refer to the chapter on Foreign Adoptions.

[350] Subsection 69.4(2) of the *Immigration Act* provides that

8.3.2.1. Kahlon

In ***Kahlon***,[351] the Federal Court held that a hearing before the former Immigration Appeal Board is a hearing *de novo* in the broadest sense. Hence, the Board is to apply the definitions as they read at the time of the hearing. In ***Kahlon***, the *Regulations* had been amended between the time of the refusal and the hearing before the Immigration Appeal Board. At the time of the hearing, the principal applicant's "illegitimate" children qualified as dependants.

8.3.2.1.1. Exceptions

In the case of an amendment which is detrimental to the applicant, the Appeal Division must consider the *Interpretation Act* provisions which preserve rights accrued before the change to the *Regulations*.[352] The Court in ***Kahlon*** did not need to consider those provisions, as the changes benefited the applicants. In ***McDoom***,[353] the Court held that applications should not be prejudiced by additional requirements imposed by amendments made to the *Regulations* after the application date.

Section 11 of SOR/92-101[354] provides that the former *Regulations* continue to apply to those applications where the undertaking has been filed before March 27, 1992. A panel of the Appeal Division, in applying section 11, has narrowed its application to the changes made by SOR/92-101, in that the applicants were still affected by other, favourable, amendments made to the *Regulations* after that date.[355]

8.3.2.2. **Lidder**

The effective date of a sponsored application for permanent residence is the date the application is filed.[356] It does not matter that the requirements for membership in the family class were met prior to that date, if they are no longer met by the date of the application.

> The Appeal Division has, in respect of appeals made pursuant to sections...77, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to...the refusal to approve an application for landing made by a member of the family class.

[351] ***Kahlon v. M.E.I.* (1989), 7 Imm.L.R. (2d) 91 (F.C.A.).**

[352] Section 43 of the *Interpretation Act* provides:

> 43. Where an enactment is repealed in whole or in part, the repeal does not ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

[353] ***McDoom, supra,*** footnote 332.

[354] ***Supra***, footnote 335.

[355] See ***Jiminez, supra,*** footnote 343, where the Appeal Division held that the applicant had to meet the test of "unmarried son" using the new definition of "son."

[356] ***Lidder v. Canada (M.E.I.)* (1992), 136 N.R. 254, 16 Imm. L.R. (2d) 241 (F.C.A.).**

8.3.2.3. **Lidder, Kahlon,** ***and section 11 of SOR/92-101***

SOR/92-101 came into effect after the ***Kahlon*** and ***Lidder*** decisions were rendered.[357] Hence, as a regulatory provision, it takes precedence over these decisions where they come into conflict.

In the case of undertakings filed before March 27, 1992, the law which applies on the date of application is the *Immigration Regulations* as they read before their amendment by SOR/92-101 on March 27, 1992.

Where the undertaking was filed on or after March 27, 1992, the law which applies on the date of application, is the law as it read on that date.[358]

8.3.2.4. Other Case Law

In a few recent decisions, the Federal Court does not appear to have considered section 11 of SOR/92-101 and/or subsection 6(6) of the *Regulations* in reaching its decision.[359]

In one recent decision,[360] the Court held that applications that were filed, at the request of the Minister, during the processing of an "in-Canada" application for permanent residence of the applicants' mother, had to be processed and either granted or refused. It did not matter that the applications were requested only to obtain information with regard to the processing of the mother's application. Further, since these applications were still outstanding when the mother sponsored her children, their applications became sponsored applications when the undertaking was filed. It did not matter that the mother was not eligible to sponsor the applications when they were filed. The date of the original applications was the effective date of the application. The Court went on to find that the applicants were entitled to be processed under the laws in effect at the time the applications were filed. In this case, the original applications were filed in August of 1990. According to section 11 of SOR/92-101, the former definitions only continued to apply to applications in which the undertaking had been filed prior to March 27, 1992. Since the undertaking was filed in December of 1992, the current definitions of "dependent son" and "dependent daughter" should have applied to these applications, even if they were filed in August of 1990. In this case, the Court did not consider section 11 of SOR/92-101, and to that extent, the decision regarding the applicable law is *per incuriam*, and not binding.

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[357] ***Ibid, Lidder*** was decided on March 10, 1992.

[358] See for example, ***M.C.I. v. San Luis, Luzviminda Peralta*** **(F.C.T.D., no. IMM-5054-94), Dube, July 6, 1995,** and ***M.C.I. v. Nikolova, Velitchka*** **(F.C.T.D., no. IMM-16-95), Wetston, October 10, 1995..** In both of these cases, both the undertaking and the applications were filed after March 27, 1992, and the Court only makes reference to ***Lidder*** in determining the applicable law.

[359] See ***Ibid, San Luis***; and ***Nikolova, supra,*** footnote 358. In these two cases, the Court makes broad statements which could be interpreted as meaning that the date of the undertaking is not relevant to determining the applicable law. However, the Court did not consider s.11 or subsection 6(6), nor was it strictly necessary for it to do so, on the facts of the case.

[360] ***M.C.I. v. Jimenez, Emilia*** **(F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.**

8.4. SPECIFIC RELATIONSHIPS

8.4.1. “Unmarried son” and “Unmarried daughter”

If the Appeal Division determines that the pre-March 27 1992 definitions of “unmarried son” and “unmarried daughter” apply, then they will go on to determine whether the applicants are members of these classes. In making this determination, the Appeal Division should also consider the definition of “unmarried” and the appropriate definitions of “son” and “daughter.”[361] “Unmarried” was defined, prior to March 27, 1992, as “...not married and has never been married.”[362] This determination is a factual one based on the evidence presented to the Appeal Division in each case.[363]

8.4.2. “Dependent Son” and “Dependent Daughter”

To come within these definitions, a son or daughter has to establish dependency either by showing he/she is under 19 years of age and unmarried,[364] or by showing he/she is dependent due to a disability, or full-time, continuous attendance at an educational institution. Subsection 2(7) of the *Regulations* allows the interruption of studies for an aggregate period not exceeding one year.[365] Further, the date on which the requirements of the definition must be met is clarified by subsection 6(6) of the *Regulations*.[366] The age requirement must be met at the time the application is received by Immigration, and the marital and student status requirements must be met both at the time of filing the application, and when the visa is issued. In determining whether the applicants are members of these classes, the definitions of "son" and "daughter", and subsections 2(7) and 6(6) of the *Regulations* should be considered.

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[361] See ***Jiminez, supra,*** footnote 343.

[362] On March 27, 1992, the definition of “unmarried” was revoked.

[363] For an example of such determinations, see ***Khan, Idrees Azmatullah v. M.E.I.*** **(I.A.D. V92-01293), Gillanders, MacLeod, Verma, March 4, 1993, QL [1993] I.A.D.D. No. 54,** and ***Abraham, Adam Ahmed v. M.E.I.*** **(I.A.D. T92-09223), Fatsis, November 16, 1993, QL [1993] I.A.D.D. No. 633.**

[364] Please note that the definition of “unmarried” was revoked on March 27, 1992. Previously it was defined as “...not married and has never been married.”

[365] Subsection 2(7) of the *Immigration Regulations, 1978* provides:

> 2.(7) For the purposes of subparagraph (b)(i) of the definitions “dependent son” and “dependent daughter”, where a person has interrupted a program of studies for an aggregate period not exceeding one year, the person shall not be considered thereby to have failed to have continuously pursued a program of studies.

[366] Subsection (6)(6) of the *Immigration Regulations, 1978* provides:

> 6.(6) A visa officer shall not issue an immigrant visa to a dependent son or dependent daughter referred to in paragraph (b) of the definition “member of the family class” in subsection 2(1) or a dependent son or dependent daughter of a member of the family class unless
>
> (a) at the time the application for an immigrant visa is received by an immigration officer, the son or daughter meets the criteria respecting age, and marital or student status set out in the definition “dependent son” and “dependent daughter” in subsection 2(1); and
>
> (b) at the time the visa is issued, the son or daughter meets the criteria respecting marital or student status set out in those definitions.

Paragraph (c) of the definition of "dependent daughter" (and "dependent son") sets out three requirements, all of which must be met: the daughter (son) must be "wholly or substantially financially supported by her parents;" "determined by a medical officer to be suffering from a physical or mental disability;" and "determined by an immigration officer...to be incapable of supporting herself by reason of such disability."[367]

Likewise, under paragraph (b), the applicant must demonstrate both continuous enrollment in an educational institution, and financial dependency on the parents.[368]

"Physical disability" includes a hearing disability.[369]

An issue which frequently arises is whether the son or daughter has been continuously enrolled in an educational program. Subsection 2(7) of the *Regulations* allows for an interruption in the applicant's studies for "an aggregate period not exceeding one year."[370]

One approach is to look first at whether there was a failure to attend continuously, and then at subsection 2(7) of the *Regulations*, to determine whether the interruption exceeded an aggregate period of one year. The *Regulations* provide that "...enrollment and attendance are separate but conjunctive requirements, both enrollment and attendance must be proven.... The dictionary meaning of 'continuous' is 'unbroken, uninterrupted.'" The failure to attend for a full school year, even if continuously enrolled, is a failure to attend continuously.[371]

In applying subsection 2(7), two questions must be asked: "Is the event which caused the applicant to cease attending an academic institution an unanticipated event in the course of her studies: If so, did the interruption last for an aggregate period which exceeded a year?"[372]

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[367] ***Kaur, Manjit v. M.C.I.*** **(F.C.T.D., no. IMM-5844-93), MacKay, May 19, 1995.**

[368] See for example, ***Casinathan, Anandarajan v. M.C.I.*** **(IAD T94-00402), Hopkins, October 19, 1994, QL, 1994] I.A.D.D. No. 938**, and ***Layal, Harbhajan Singh v. M.C.I.*** **(IAD T93-12919), Muzzi, September 15, 1995, QL, [1995] I.A.D.D. No. 598.**

[369] ***Haroun, Stanley v. M.C.I.*** **(IAD V94-00129), Singh, August 29, 1994.**

[370] ***Supra***, footnote 365.

[371] ***Estoesta, Samuel v. M.C.I.*** **(IAD W94-00069-70), Wiebe, May 30, 1995.**

[372] ***Walczak, Henryk v. (S.S.C.)*** **(IAD T93-12927), Aterman, August 3, 1994, QL, [1994] I.A.D.D. No. 864**, applied in ***Estoesta, supra,*** footnote 371.

The cancellation of a course,[373] and the failure to gain admission to an institution,[374] have been held to be unanticipated events.

In calculating the aggregate one-year period in subsection 2(7) of the *Regulations*, the annual three month vacation periods are not to be included. Subsection 2(7) "is intended to address...an interruption in the program of studies which is not a normal and expected part of the course of studies." Further, an applicant does not continue to be a student from the time the applicant finishes their previous course to the time she/he is notified of the failure to gain admission. It is only if the applicant has been accepted into the institution that the applicant continues to be a student. Thus, where an applicant had finished one course of studies in May of 1992, written and failed an entrance exam to another institution in July 1992, and was forced to wait until July 1993 to attend school again, she had interrupted her studies for an aggregate period exceeding one year (14 months).[375]

There is conflicting caselaw on the degree to which subsection 2(7) of the *Regulations* should be given a liberal interpretation. In *obiter dicta*, one panel has indicated that there may be cases where "an aggregate period not exceeding one year"[376] should be given a liberal interpretation, in acknowledging the contextual realities of the case.[377]

An aggregate period not exceeding one year may be interpreted as a September - to - August school year (a 12-month period).[378]

One panel has taken the view that:

"...Once attaining 19 years of age an applicant must be in full-time attendance at a recognized school, educational or vocational institute without any breaks in the course of studies other than normal school holidays, including summer breaks of three months or more. There is no provision in the definition to allow for private study under the tutelage of a recognized professional tutor. There is no provision for disruption of studies by way of school closures due to civil war, civil strife or natural disaster."[379]

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[373] ***Estoesta, supra,*** footnote 371.

[374] ***Walczak, supra,*** footnote 372.

[375] ***Walczak, supra,*** footnote 372.

[376] ***Supra***, footnote 365.

[377] ***Estoesta, supra,*** footnote 371., where the panel disagreed with the interpretation, in ***Walczak, supra,*** footnote 372, of "an aggregate period not exceeding one year."

[378] ***Estoesta, supra,*** footnote 371.

[379] ***Casinathan, supra,*** footnote 368.

In addition, the issue of the genuine nature of the educational institution has been raised, but not yet decided by the Appeal Division.[380]

8.4.3. "Spouse"

See chapter on Marriages.

8.4.4. "Fiancé"

See chapter on Engagements of Convenience.

8.4.5. "Dependant"

The definition of "dependant" was amended on March 27, 1992, to, *inter alia*, incorporate the definitions of "dependent son" and "dependent daughter." In addition, subparagraphs 6(5)(a)(iii) & (iv) of the *Regulations*, which allowed the "opting out" of dependants who were 21 years or older, was revoked.[381] Pursuant to section 11 of the amending instrument (SOR/92-101),[382] the former regulations continue to apply to those applications where the undertaking had been filed before March 27, 1992. A panel of the Appeal Division, in applying section 11, has narrowed its application to the changes made by SOR/92-101, in that the applicants were still affected by other, favourable, amendments made to the *Regulations* after that date.[383]

A "dependant" is not a "member of the family class," unless they also come within the definition of member of the family class. Where the application for landing made by the member of the family class is not refused, and only the application for landing made by the alleged dependant is refused, the Federal Court of Appeal has held that the Board rightly declines jurisdiction to hear the appeal. "Section [77] of the Act makes it quite clear that a sponsor only has a right of appeal from the refusal of an application by a member of the family class, not from the refusal to include an alleged dependant of such a member."[384]

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[380] See for example, ***Layal, supra,*** footnote 368, where the evidence did not establish that the institutions were not genuine. See also, ***Casinathan, supra,*** footnote 368., where the Appeal Division refers to a "recognized" educational institute, however, it was not necessary to address that issue in reaching the decision.

[381] In order to be "opted-out" of the application, the dependant had to be over 20 years of age, and the dependant or the sponsor had to declare, in writing, that the dependant did not intend to immigrate to Canada. Where a dependant had been "opted-out", the visa officer did not have to assess the admissibility of the dependent who "opted out," nor could a visa be issued to that dependant as an accompanying dependant.

[382] ***Supra***, footnote 335.

[383] See ***Jiminez, supra,*** footnote 343, where the Appeal Division held that the applicant had to meet the test of "unmarried son" using the new definition of "son."

[384] ***Bailon, Leonila Catillo v. M.E.I.*** **(F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986, QL, [1986] F.C.J. No. 386.** See also, for example, ***Singh, Tarsam v. M.C.I.*** (IAD T93-12275), Bartley, November 9, 1995.

However, at least one decision of the Appeal Division suggests that the Appeal Division retains jurisdiction over the refusal, of alleged dependants who are not members of the family class in relation to the sponsor.[385]

On appeal to the Appeal Division, those members of the family who are not found to be "dependants" may be split off from the appeal, and the appeal allowed with regard to the other applicants.[386] This should be distinguished from the situation where one of the dependants is found to be inadmissible.[387]

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[385] ***M.C.I.*** *v.* ***Mathew, Suresh*** **(I.A.D. T93-07743), Aterman, December 22, 1994.** Note, however, that the Appeal Division did not consider the Federal Court's decision in ***Bailon*** in reaching its decision.

[386] ***Mundi, supra,*** footnote **Error! Bookmark not defined.**.

[387] ***Gharu, supra,*** footnote **Error! Bookmark not defined.**.

CHAPTER 7

CASE LIST: RELATIONSHIP

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8.4.6. CHAPTER 8

"NOT AN IMMIGRANT"

8.1 DEFINITIONS

Where a sponsored application for permanent residence is refused on the basis that the applicant is not an immigrant, the applicant is found to be part of the inadmissible class of persons described in section 19(2)(d)[388] of the *Immigration Act*:

> 19.(2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:
>
> (d) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders or directions lawfully made or given under this Act or the regulations.

The following relevant definitions are found in section 2(1) of the *Immigration Act:*

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[388] R.S.C. 1985, c. I-2.

"*immigrant*" means a person who seeks landing[389];

"*landing*" means lawful permission to establish permanent residence in Canada[390];

Therefore, where the visa officer is of the opinion that the applicant does not have the requisite intention to reside permanently in Canada, the visa officer may refuse to approve the application for permanent residence on the basis that the applicant is not an immigrant as defined in the *Immigration Act*.

8.2 INTENTION

An applicant for permanent residence must have the requisite intention to reside permanently in Canada. The visa officer will undertake a close examination of all of the surrounding circumstances to determine whether or not such intention exists.

Intention can be demonstrated in one of two ways. "It [intention] can be revealed by speech or conduct." [391] Generally, the intention of the applicant will become evident during the visa officer's interview with the applicant in the statements made by the applicant in answer to the visa officer's questioning. Other times, the finding of no intention will be based on the applicant's failure to pursue all of the steps involved in the application process.[392] The visa officer's decision may also be founded on evidence of the applicant's past behaviour when he or she had previously been granted permanent resident status, but subsequently lost it.[393]

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[389] ***Ibid.***

[390] As enacted by S.C. 1992, c. 49, s. 1(3).

[391] ***Kan* v. *Canada (M.E.I.)* (1992), 17 Imm. L.R. (2d) 206 (F.C.T.D.)**

[392] See ***Villanueva, Antonio Ordonez* v. *M.E.I.* (IAB 85-9741), Benedetti, Weisdorf, Bell, November 12, 1986**, where the applicant's failure to respond to the visa officer's request for documentation regarding his separation from his wife led the Immigration Appeal Board to conclude that he was not an immigrant. In ***Saroya, Kuljeet Kaur* v. *M.E.I.* (IAD V92-01880), Verma, September 21, 1993**, one of the bases for the refusal was that the applicant disregarded instructions given to her during the processing of the application, as she did not show up for three scheduled interviews and did not respond

8.2.1 Meaning of "permanently"

The ordinary definition of "permanently" connotes something lasting indefinitely. However, this ordinary definition is not applicable within the context of permanent residence. "Permanently" does not mean immutably or forever, or for the applicant's lifetime or anyone else's. An intention to leave Canada at some time in the indefinite future is not inconsistent with an intention to reside permanently in Canada until then.[394] Nevertheless, "permanently" has the opposite meaning of "temporarily", and an applicant must not be seeking admission to Canada for a short, fixed period of time for a temporary purpose.[395]

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to some communications. See also ***Goindi, Surendra Singh*** **v. *M.C.I.* (IAD T93-10856), Aterman, December 13, 1994**, where the applicants had ignored requests for them to undergo medical examinations as was required.

[393] In ***Shergill, Sohan Singh*** **v. *M.E.I.*** (IAD T92-05406), Weisdorf, Chu, Ahara, February 8, 1993, the applicant was landed in 1981, but returned to India shortly thereafter, leaving the sponsor and her sister behind. In her present application, statements had been made to the visa officer that she wished to remain in Canada for only six or seven months, for the purpose of bringing her alleged adopted son to Canada. The applicant's declared intentions were "strikingly similar" to her behaviour in 1981, and therefore it was reasonable to conclude that she had no intention to reside permanently in Canada. See also: ***Patel, Mohamed*** **v. *M.E.I.* (IAD T91-03124), Weisdorf, Ahara, Fatsis, April 15, 1993**, where the panel considered the applicants' past actions as one of the factors in assessing their intentions in the current applications; ***Saroya, supra***, footnote 5; and ***Sidhu, Gurdev Singh*** **v. *M.E.I.* (IAD V92-01678), Singh, November 17, 1993**.

[394] ***Re Toor and M.E.I.*** **(1983), 144 D.L.R. (3d) 554 (F.C.A.)**. In ***Dhaul, Paramjit Kaur*** **v. *M.E.I.* (IAB 86-6004), Chambers, March 5, 1987**, the Immigration Appeal Board held that a person may still be an "immigrant" for the purposes of the *Immigration Act* even though the person is undecided as to whether or not he or she will wish to remain in Canada after their admission.

[395] In ***Mirza, Shahid Parvez*** **v. *M.E.I.* (IAB 86-9081), Teitelbaum, Weisdorf, Townshend, December 1, 1986**, the Immigration Appeal Board held that an applicant who intended to come to Canada for only a temporary period of time was not an immigrant.

There are several examples in the caselaw of what have come to be known as "courier parents". This is where the panel finds that the purpose of the applicant's immigration to Canada is to facilitate the immigration to Canada of the applicant's accompanying dependent son or daughter; the applicant does not have the requisite intention to reside permanently in Canada, as the applicant intends to return to his or her homeland after spending a period of time in Canada.[396]

Other factors which have been considered by panels in the determination of whether or not an intention to reside permanently in Canada exists include the preservation of a family base in the homeland[397] and the retention of assets abroad.[398]

8.2.2 Motivation

The relevant issue is whether or not the applicant has the requisite intention to reside permanently in Canada. The motivation behind the applicant's intention is not of itself relevant.[399] For example, the Appeal Division held that an applicant's desire to facilitate the entry into Canada of her two unmarried sons did not, in that case, preclude a finding of an intention on the part of the applicant to reside permanently in Canada; therefore, the applicant was found not to be a "courier parent".[400]

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[396] See for example: ***Shergill, supra***, footnote 6; ***Patel, supra***, footnote 6; ***Kala, Bhupinder Kaur* v. *M.E.I.* (IAD T92-09579), Arpin, Townshend, Fatsis, May 18, 1993**; ***Mahil, Tarlochan* v. *M.E.I.* (IAD T92-08178), Weisdorf, Townshend, Ahara, May 18, 1993**; ***Kamara, Abass Bai Mohamed* v. *M.E.I.* (IAD W91-00092), Arpin, February 24, 1994**; and ***Brown, Earlyn* v. *M.C.I.* (IAD T93-09712), Ramnarine, August 17, 1994**. In ***Molice, Antoine Anel* v. *M.E.I.* (IAD M93-07976), Durand, March 22, 1994**, one of the factors which the panel considered was the sponsor's statement that he did not sponsor his parents in the early 1980s when he could have, as he was waiting until the law would allow him to also sponsor his siblings, his parents' accompanying dependents. The panel held that if the applicants were not "courier parents", there would have been no reason for the sponsor to have waited for the law to change before sponsoring them; as well, the sponsor could not have known or predicted that the law would be changed in the future.

[397] ***Deol, Dilbag Singh* v. *M.E.I.* (IAB 80-6012), Campbell, Hlady, Howard, February 11, 1981**.

[398] ***Pacampara, Enrique Pandong* v. *M.E.I.* (IAB 85-9684), Ariemma, Arkin, De Morais, April 10, 1987**; and ***Ruhani, Zahida* v. *M.C.I.* (IAD T92-07177), Teitelbaum, Muzzi, Band, March 8, 1995**.

[399] ***Aquino, Edmar* v. *M.E.I.* (IAB 86-9403), Eglington, Weisdorf, Ahara, August 13, 1986**.

8.2.3 Timing

In appeals where the issue is whether or not the applicant is an immigrant, the question of timing arises: that is, at what point in time must the applicant have had the requisite intention to reside permanently in Canada? In *Kahlon*[401], the Federal Court of Appeal held that the Immigration Appeal Board had to decide the appeal before it on the basis of the law as it stood at the time of the hearing of the appeal, based on the fact that the hearing before the Board was a hearing *de novo*. Applying *Kahlon*, where the refusal is based on the applicant's not being an immigrant, the panel would determine the applicant's intention as of the date of the hearing. However, there has been some conflicting caselaw in this area.

In *Patel*, it was held that a determination should be made of the applicant's intention at the time that the applicant made his or her application for permanent residence, since it is a jurisdictional question.[402] However, more recently, Appeal Division panels have not followed *Patel* on the timing issue, and have instead relied on *Kahlon* and held that the applicant's intention to establish permanent residence in Canada must be determined as of the time of the hearing. For example, in *Ampona*[403], the majority applied *Kahlon* and held that intention must be assessed at the time of the hearing. The dissenting member specifically refused to follow the decision in *Patel*.[404] In *Quadri*[405], the Appeal Division stated that the burden of proof on a sponsor is to prove that either the visa officer erred in finding that there was no intention to immigrate at the time of the interview, or alternatively, that the intention to immigrate arose after the interview and was present at the time of the hearing of the appeal.

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[400] ***Ruhani, supra***, footnote 11.

[401] ***Kahlon* v. *Canada (M.E.I.)* (1989), 7 Imm.L.R. (2d) 91 (F.C.A.).**

[402] ***Patel, Manjulaben* v. *M.E.I.* (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1990** (leave to appeal refused July 16, 1990); see ***infra***, section 8.30, for a discussion on jurisdiction. ***Patel*** was applied by the majority in ***Uddin, Mohammed Moin* v. *M.E.I.* (IAD T91-02394), Chu, Ahara, Fatsis (dissenting), August 28, 1992.**

[403] ***Ampona* v. *Canada (M.E.I.)* (1992), 17 Imm. L.R. (2d) 219 (IAD).**

8.3 JURISDICTION

The Appeal Division has held that whether or not such a refusal is valid in law is a matter which goes to the panel's jurisdiction.[406] The panel will allow the appeal in law if it finds that the refusal is not valid in law, in that the sponsor has proven that the applicant is indeed an immigrant because the applicant does have the requisite intention to reside permanently in Canada. If the appeal is allowed in law, the panel may also grant special relief and allow the appeal on compassionate or humanitarian grounds.[407]

However, if the sponsor has not proven that the applicant has the requisite intention to reside permanently in Canada, this leads to the conclusion that the applicant is not seeking "landing" as defined in the *Immigration Act*. The Appeal Division has held that, in these circumstances, the applicant has not made an application for landing, therefore the Appeal Division has no jurisdiction in the matter pursuant to section 77 of the *Immigration Act*, and accordingly the appeal has been dismissed for lack of jurisdiction.[408]

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[404] See also the dissenting reasons in ***Uddin**, **supra***, footnote 15. In ***Sanghera, Charan Singh*** **v. *M.E.I.* (IAD V93-00595), Verma, December 9, 1993**, the panel held that at the time of the hearing, the applicant wanted to live permanently in Canada; his contrary intention at the time of the interview was due to stress and shock on account of his mother's death and his brother's recent suicide in Canada. Similarly, in ***Sidhu, supra***, footnote 6, the panel held that any statements that the father may have made about returning to India were due to his emotional stress at the time. See also ***Sanghera, Avtar Singh*** **v. *M.C.I.* (IAD V93-02360), Singh, July 22, 1994.**

[405] ***Quadri, Fatai Abiodun*** **v. *S.S.C.* (IAD T93-12576), Hopkins, September 30, 1994.**

[406] ***Patel**, **supra***, footnote 15. But see ***Pangli, Amarjit Kaur*** **v. *M.E.I.* (IAB 84-6228), Anderson, Chambers, Howard, April 28, 1986**, where the Board held that this was not a jurisdictional question, but a question of whether or not the applicant was within an inadmissible class; reversed on other grounds by ***Pangli*** **v. *Canada (M.E.I.)* (1987), 4 Imm. L.R. (2d) 266 (F.C.A.).**

[407] See for example ***Sall, Kashmir Kaur*** **v. *M.E.I.* (IAD V92-01785), Arpin, July 27, 1993.**

There has been some conflicting caselaw on the issue of the granting of special relief where the panel has found that the refusal was valid in law. Where the Appeal Division has found that it has no jurisdiction, it has been held that the panel cannot grant special relief, even if it would have found that sufficient compassionate or humanitarian considerations existed to warrant the granting of special relief.[409] On the other hand, where the issue of jurisdiction did not arise, some panels have granted special relief where the refusal was found to be valid in law.[410]

In *Datoc*[411], the Immigration Appeal Board held that, as this issue was jurisdictional in nature, it need not be raised as a ground of refusal.

8.4 FAIRNESS

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[408] See for example: ***Singh, Malkiat*** **v. *M.E.I.* (IAD T93-02753), Weisdorf, June 16, 1993**; ***Saroya, supra***, footnote 5; ***Kamara, supra***, footnote 9; ***Brown, supra***, footnote 9; and ***Goindi, supra***, footnote 5.

[409] See for example: ***Niles, Hyacinth*** **v. *M.E.I.* (IAB 82-9966), Benedetti, Suppa, Tisshaw, September 17, 1984**; and ***Molice, supra***, footnote 9.

[410] See for example: ***Al-Yafie, Omar Hussein*** **v. *M.E.I.* (IAB 86-1642), Lefebvre, Morgan, Arsenault, October 1, 1987**, where the Board granted special relief after concluding that the visa officer had correctly refused the application on the ground that the applicant was not an immigrant; and ***Jeudi, Liliane*** **v. *M.E.I.* (IAD M92-11211), Angé, June 30, 1993**, where the Appeal Division granted special relief without apparently examining whether the refusal was valid in law.

[411] ***Datoc, Evelyn*** **v. *M.E.I.* (IAB 83-9238), D. Davey, Suppa, Tisshaw, December 17, 1984**; followed by the Appeal Division in ***Kamara, supra***, footnote 9.

A sponsor may challenge the validity of a refusal on the basis that there was a breach of the principles of fundamental justice, namely the denial of a fair hearing; such an argument is based on the decision in *Pangli*[412]. In that case, the Court held that the immigration officer had a duty to clear up conflicting statements by the applicant made on the same day. Furthermore, the immigration officer who interviewed the applicant should have been the one who actually refused the application[413]; this principle was satisfied where one immigration officer interviewed and made a recommendation to refuse the application, and another officer countersigned the recommendation and signed the refusal letter.

Pangli has also been applied to support the principle that a visa officer has the duty to explain to the applicant the difference between permanent resident and visitor status, and to explain the possible negative impact of any statutory declaration signed by the applicant, which attests to the applicant's intention not to reside permanently in Canada.[414]

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[412] ***Pangli* v. *Canada (M.E.I.)* (1987), 4 Imm.L.R. (2d) 266 (F.C.A.).**

[413] This principle was applied in ***Gill, Rajwinder Kaur* v. *M.E.I.* (IAD V91-00898), Arpin, July 26, 1993**.

[414] See for example: ***Rodriguez, Meliton* v. *M.E.I.* (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991**, where the panel applied ***Pangli*** and held that, if at the interview the applicant indicated a desire to come to Canada as a visitor, the choice of a visitor visa rather than a permanent resident visa should have been put to her; there was no evidence that such a choice had been given to the applicant; ***Merius, Ronald* v. *M.E.I.* (IAD M93-05810), Angé, June 13, 1994**; and ***Quadri, supra,*** footnote 18.

CHAPTER 8

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9. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

9.1. GENERALLY

This is one of the two grounds of appeal from a sponsorship refusal.[415] It permits the sponsor to adduce evidence of a compassionate or humanitarian nature. The considerations must be shown to be sufficient to warrant the granting of special relief. It is always open to the Appeal Division to allow an appeal on both legal and equitable grounds. It should be pointed out that "compassionate or humanitarian considerations" are not "all the circumstances of the case", the latter grounds applying in respect of an appeal against a removal order.[416]

9.1.1. Definition

Historically, compassionate and humanitarian considerations have been looked at compendiously rather than discretely. The following definitions were given in *Chirwa*:[417]

> [...]"compassion" [is defined] as "sorrow or pity excited by the distress or misfortunes of another, sympathy" [...] "compassionate considerations" must [...] be taken to be those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another – so long as these misfortumes warrant the granting of special relief from the effect of the provisions of the Immigration Act.
>
> [. . .]

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[415] Section 77(3)(b) of the *Immigration Act* provides:

> Subject to subsection (3.1), a Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to subsection (1) may appeal to the Appeal Division on either or both of the following grounds:
>
> [...]
>
> (b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

[416] ***Warner, Newton George* v. *M.E.I.* (I.A.B. 85-9421), Eglington (dissenting), Rotman, Warrington, April 27, 1987.**

[417] ***Chirwa* v. *M.M.I.* (1970), 4 I.A.C. 338 at p. 350.**

> [...] "humanitarianism" [is defined] as "regard for the interests of mankind, benevolence."

Sufficiency is customarily determined by balancing the compassionate or humanitarian evidence against the particular ground of refusal at issue in the appeal.[418] Appeal Division reasons will often express the conclusion that "the compassionate or humanitarian considerations were or were not sufficient in this case to overcome the ground of inadmissibility."

The jurisdiction of the Appeal Division to grant special relief is loosely referred to as an "equitable" jurisdiction. It is not, strictly speaking, equitable, for none of the equitable doctrines such as the "clean hands" doctrine or laches are at play.[419] It requires the exercise of a discretionary power. The discretion has been described as judicial. It must be exercised after a full, fair and proper hearing and must be based on the evidence adduced at that hearing and nothing else.[420] There must be an objective analysis and proof of the existence of reasonable, not sentimental or emotional, grounds.[421] The discretion must be exercised in good faith.

Consideration of an appeal on compassionate or humanitarian grounds requires a balancing of the evidence for and against the granting of special relief.[422]

9.1.2. Who May Benefit From Special Relief

For an appeal to succeed in equity, it must relate to all grounds of refusal.[423] Grounds of refusal are not severable in law or in equity.

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[418] See ***Lai, Gia Hung*** **v.** ***M.E.I.*** **(IAD V92-01455-E), Wlodyka, Singh (dissenting in part), Verma, November 12, 1993,** at p. 28; see also ***Luong, Chinh Van*** **v.** ***M.E.I.*** **(IAD V92-01963), Clark, July 5, 1994** at pp. 2, 3.

[419] ***Mundi*** **v.** ***M.E.I.*** **[1986] 1 F.C. 182 (C.A.).**

[420] From "Immigration Inquiries and Appeals from Orders of Deportation" by Janet V. Scott, Q.C., published in ***Law Society of Upper Canada Special Lectures (1971), Administrative Practice and Procedure***, at p. 129.

[421] ***Ibid***, at p. 131.

[422] ***Kriss, Gabor et al.*** **v.** ***M.E.I.*** **(I.A.B. 88-00117, 88-00118), Wlodyka, Gillanders, Singh, November 8, 1988.**

Special relief may only be granted in respect of members of the family class. In other words, the applicants must first be determined to come within the definition of a "member of the family class"[424] or qualify as dependants of a member of the family class. To proceed otherwise would have the effect of expanding the family class beyond its prescribed limits.[425]

It is advisable to examine briefly the issue of splitting in law as it may have certain implications on the necessity of dealing with an appeal in equity. The splitting of an application in law is not possible unless the inadmissible person at the source of the refusal does not qualify as a dependant.[426] Where the IAD finds that an individual listed on an application does not qualify as a member of the family class on his own right or as a dependant of a member of the family class, the application should be split and the appeal allowed in law for the remaining family members if there are no other legal impediments. The appeal could also be allowed in equity for these remaining family members if warranted although this would not be necessary for the appeal to succeed.

An application should always be split in law where it involves two or more members of the family class who are not otherwise dependants. One example would be the sponsorship of a daughter and the spouse of the sponsor, where the daughter is not related to the spouse. In such a case, no ground of refusal related to one applicant could affect the other applicant because neither qualifies as a dependant of the other. The same would not hold true if the daughter was also the spouse's daughter. In such a scenario, splitting in law could only occur if the ground of refusal related to the spouse as she is not a dependant of her daughter. Any ground of refusal related to the daughter would affect her mother because the daughter is both a member of the family class in her own right and a dependant of her mother. In this latter case, there could be no splitting of the application and equity would be necessary for the appeal to succeed.

When it comes to marriages and engagements of convenience, there is somewhat of an anomaly as regards the Appeal Division's jurisdiction to entertain an appeal on "equitable" grounds. This anomaly is due to the construction of the applicable regulatory provisions. Section 4(3) of the *Immigration*

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[423] Members are encouraged to deal with the legality of a refusal in all cases where it is challenged. It is not good practice to embark on the consideration of compassionate or humanitarian grounds without regard to the legality of the refusal. And if a refusal is found to be invalid in law, members may choose not to rule on the appeal in equity.

[424] Section 2(1) of the *Immigration Regulations, 1978*.

[425] ***Singh, Donna Marie* v. *M.E.I.* (I.A.B. 78-9088), Weselak, Petrie, Tremblay, August 23, 1978.**

[426] ***Mundi, supra*** note 419. There can be no splitting of an application in equity.

Regulations, 1978[427] excludes from the family class and thus from the Appeal Division's "equitable" jurisdiction, a spouse who is a party to a marriage of convenience. With respect to an engagement of convenience, the visa officer is prohibited by the Regulations[428] from issuing the fiancé a visa. The fiancé would fall within an inadmissble class, section 19(2)(d) of the *Immigration Act* (cannot fulfil a requirement of the regulations), but nothing would preclude the Appeal Division from overcoming this ground of inadmissibility by granting special relief although in practice, such a scenario appears unlikely.

In the case of *Kainth*[429], the Federal Court of Appeal upheld the Appeal Division's jurisdiction to grant special relief on an appeal from a refusal of a sponsored application for permanent residence, where the applicant was a person described in section 19(1)(i)[430] of the Act, notwithstanding section 55[431] of the Act. Thus, the Appeal Division may grant special relief in cases involving refusal of an applicant on grounds of prior deportation and failure to obtain the written consent of the Minister to enter Canada.

In *Hui*[432], the Appeal Division held that it had jurisdiction to grant equitable relief even though the sponsor who was a Canadian citizen no longer met the residence requirement for sponsorship at the time of his appeal.

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[427] Section 4(3): The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse.

[428] Section 6. (1): Subject to subsections (1.1), (3.1), (3.2), (4), (5) and (6), where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member and the member's accompanying dependants if

(d) in the case of a fiancée,

(i) the sponsor and the fiancée intend to reside together permanently after being married and have not become engaged primarily for the purpose of the fiancée gaining admission to Canada as a member of the family class .

[429] ***S.G.C.* v. *Kainth, Kermjit Kaur* (F.C.A. no. A-34-94), Marceau, MacGuigan, Robertson, June 10, 1994.**

[430] Section 19(1): No person shall be granted admission who is a member of any of the following classes: ... (1) persons who, pursuant to section 55, are required to obtain the consent of the Minister to come into Canada but are seeking to come into Canada without having obtained such consent.

[431] Section 55(1): Subject to section 56, where a deportation order is made against a person, the person shall not, after he is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister unless an appeal from the order has been allowed.

[432] ***Hui, Jenkin Ching-Kim* v. *M.C.I.* (IAD V92-01452), Ho, March 30, 1995.**

9.1.3. Effect of a Favourable Decision on Compassionate or Humanitarian Grounds

The effect of a favourable decision on compassionate or humanitarian grounds is to blanket and thus overcome an otherwise valid ground of inadmissibility. The blanketing effect is in relation to that particular ground only. This means that when the application is returned to the visa officer to be further processed, if the visa officer discovers a new ground of inadmissibility, there is nothing preventing the officer from refusing the application a second time on the new ground: the Appeal Divisions's earlier decision granting special relief relates only to the ground or grounds which were before it at that time. The doctrine of *res judicata* does not apply in these circumstances and thus the Appeal Division is, on a subsequent appeal, to look at the "equitable" grounds anew and may, on the facts then existing, decide that the granting of special relief is not warranted.[433] In short, the earlier decision granting special relief may be revisited.

9.2. EVIDENCE

9.2.1. Burden of Proof

Before a decision favourable to a sponsor may be given on compassionate or humanitarian grounds, the sponsor has the burden of adducing evidence sufficient to attract this equitable jurisdiction. In *Braich*[434], for example, there was no evidence regarding the nature or severity of the medical condition underlying the refusal. The panel declined to grant special relief. What of the case of an applicant who has refused to undergo a medical examination as required by the Act? There seems to be general agreement that the Appeal Division possesses the jurisdiction to grant special relief in the face of a refusal for failure to undergo a medical examination.[435] However, the treshold for granting special relief is high, given that the integrity of the immigration system is at stake. The Appeal Division might also bear in mind the blanketing effect of a positive ruling. Such a ruling may obviate the requirement of a medical examination.

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[433] ***Wong, Kam*** **v.** ***M.E.I.*** **(I.A.B. 83-6438), Davey, Hlady, Howard, March 7, 1984.**

[434] ***Braich, Baljeet Kaur*** **v.** ***M.E.I.*** **(I.A.B. 82-9150), Davey, Teitelbaum, Suppa, April 21, 1983;** see also ***Lai, supra*** note 418.

[435] See ***Alam, Quazi Nurul*** **v.** ***M.E.I.*** **(IAD T89-06725), Bell (dissenting), Townshend,Tisshaw, July 17, 1990;** ***Chhabra, Parmod*** **v.** ***M.E.I.*** **(IAD T89-03985), Bell, Chu, Sherman, July 16, 1990;** ***Chan*** **v.** ***M.E.I.*** **(IAD T93-07826), Chu, February 22, 1994;** ***Mahmood*** **v.** ***M.C.I.*** **(IAD T94-02438), Ramnarine, April 26, 1995.**

9.2.2. Evidence Existing at the Time of the Appeal

An appeal on humanitarian or compassionate grounds is decided on the facts existing at the time the Appeal Division makes its decision. In *Gill*[436] the Court of Appeal said:

> *It is noteworthy to observe that the jurisprudence of this Court has established that a hearing of this nature is a hearing* de novo *in a broad sense, and at such a hearing the Board is entitled to consider contemporary matters which necessarily involve a consideration of changed circumstances when exercising its equitable jurisdiction.*

The principle is especially important for medical refusals because in virtually every case the validity of a medical refusal will be determined as at the time of the visa officer's refusal[437]. This is an exception to the general rule expressed by the Federal Court of Appeal in *Kahlon*[438]. The general rule is that the Appeal Division is to determine legal admissibility on the facts and law existing at the time the appeal is decided. Medical evidence of a doctor who is not a designated medical officer as to the current state of health of an applicant would be an "equitable" consideration and would therefore be admissible as per *Gill*[439].

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[436] ***M.E.I.* v. *Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991,** at pp. 6, 7.

[437] ***Mohamed* v. *M.E.I.* [1986] 3 F.C. 90 (C.A.).**

[438] ***Kahlon* v. *Canada (M.E.I.)* (1989) 7 Imm.L.R. (2d) 91 (F.C.A.).**

[439] ***Gill, supra*,** note 436.

9.2.3. Relevant Factors

It has been held that the sponsor's circumstances are at least as important as those of the applicants, if not paramount[440], on an appeal on compassionate or humanitarian grounds.

The policy objective set out in section 3(c) of the *Immigration Act*, namely, to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad, is one relevant factor. However, it has been held that since it is the basis for all sponsorship applications it is not, without more, sufficient to warrant special relief.[441] The Federal Court of Appeal, in *Mohamed*[442], drew a distinction between achieving family unification and facilitating the reunion of sponsors with their close relatives from abroad. Thus, the fact that a relative abroad does not wish or is ineligible to be reunited with a sponsor is not relevant to the granting of relief so as to permit the sponsor to be reunited with some other close relative from abroad. Following *Mohamed*, the Board held irrelevant the fact that if the applicants were granted permanent residence in Canada, their grandchildren in Pakistan would be deprived of their love and affection.[443] Similarly, a sponsor's willingness to join her husband abroad was held to be irrelevant since it is reunion in Canada that is an express objective of the Act.[444] Marriage to a Canadian citizen does not, in itself, create any entitlement to special relief.[445]

In *Deol*[446], a case involving mental retardation, the Federal Court of Appeal reversed a decision of the Appeal Division both with respect to the validity of the refusal and the exercise of its equitable jurisdiction. Concerning the latter, the Court held that the Appeal Division "failed to take into account, in particular, the nature of [the applicant's] condition, the psychological dependencies it engenders and the close bonds of affection that may arise in such a family, all in the light of the objective proclaimed in section 3(c) of the *Immigration Act* of facilitating the reunion of close relatives in Canada."[447]

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[440] ***Johl, Baljinder Kaur*** **v. *M.E.I.* (I.A.B. 85-4006), Eglington, Arpin, Wright, January 26, 1987.**

[441] ***Hylton, Claudine Ruth*** **v. *M.E.I.* (I.A.B. 86-9807), Arkin, Suppa, Ariemma, March 17, 1987;** see also ***Valdes, Juan Gonzalo Lasa*** **v. *M.E.I.* (IAD V90-01517), Wlodyka, Chambers, Gillanders, January 21, 1992**, at p. 11. In one case of the Federal Court of Appeal, Justice Mahoney at p. 6 of his concurring reasons stated: "The circumstances in which the Board may exercise its discretion under s. 77(3)(b) need not be extraordinary": ***M.E.I.*** **v. *David Ross Burgon* (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22,1991**. This case was commented on in ***Sotoodeh, Isheo*** **v. *M.E.I.* (IAD T91-00153), Fatsis, Chu (concurring), Bell (dissenting), July 22, 1991**.

[442] ***Mohamed*** **v. *M.E.I.*, *supra*** note 437.

[443] ***Ahmed, Muhammad Jamail*** **v. *M.E.I.* (I.A.B. 85-6238), Anderson, November 18, 1986**.

[444] ***Rupert, Constance Elizabeth*** **v. *M.E.I.* (I.A.B. 85-6191), Mawani, Singh, Ariemma, May 22, 1987**.

[445] ***Singh, Rosina*** **v. *M.E.I.* (I.A.B. 83-6483), Anderson, Chambers, Voorhees, December 31, 1984**.

[446] ***Deol, Daljeet Singh*** **v. *M.E.I.* (F.C.A., no. A-280-90), MacGuigan, Linden, Robertson, November 27, 1992**; see also ***Luong*, *supra*** note 418 at p. 9. In ***Parmar, Hargurjodh*** **v.*M.E.I.* (IAD T92-03914), Townshend, September 16, 1993,**

It is not altogether clear what effect evidence of hardship in an applicant's home country has on the outcome of an appeal. In one case[448], instability in the applicant's country was not adequate ground for granting special relief; in another[449], hardship did induce the panel to grant special relief. It may be a question of degree.

Often there is evidence that an applicant's opportunities in Canada would be far more attractive than in the applicant's home country. The Board has characterized this as an economic argument, which in *Judge*[450], was not accepted as a compassionate or humanitarian factor. In another case[451], however, the Board rejected the argument that money considerations could never be humanitarian or compassionate considerations as well.

Another relevant factor in medical inadmissibility cases is the policy objective set out in section 3(i) of the *Immigration Act*, namely, to maintain and protect the health, safety and good order of Canadian society.[452] The Appeal Division has also weighed the compassionate or humanitarian factors against the severity of the medical impediment[453]. The Appeal Division has also taken into consideration the cost of treatment of the applicant's condition[454].

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the Appeal Division distinguished ***Deol*** and refused the appeal in equity. It found that the appellant's conduct did not show the psychological dependency and the bonds of affection mentioned in ***Deol***.

[447] ***Deol, Ibid*** at p. 5.

[448] ***De Grano, Nathanael*** **v. *M.E.I.* (I.A.B. 86-6190), Anderson, Chambers, Howard, May 21, 1986.**

[449] ***La, Thang*** **v. *M.E.I.* (IAB 85-4133), Goodspeed, Petryshyn, Wright, March 16, 1987.** See also ***Sotoodeh, supra*** note 441 at p. 2 of the concurring reasons of Member Chu where she took into consideration the fact that "the parents belong to a minority group in a hostile host country."

[450] ***Judge, Mahan Singh*** **v. *M.E.I.* (I.A.B. 80-6239), Campbell, Hlady, Howard, March 13, 1981.**

[451] ***Doan, Hop Duc*** **v. *M.E.I.* (I.A.B. 86-4145), Eglington, Goodspeed, Vidal, September 15, 1986.**

[452] ***Lai, supra*** note 418 at p. 29.

[453] ***Dutt, John Ravindra*** **v. *M.E.I.* (IAD V90-01637), Chu, Wlodyka, Tisshaw, July 22, 1991;** ***Lai, supra*** note418.

[454] See ***Valdes, supra*** note 441; see also ***Che Tse, David Kwai*** **v. *S.S.C.*, (F.C.T.D., no. IMM-2645-93), McKeown, December 15, 1993** at p. 4.

The following are some compassionate or humanitarian considerations drawn from the case law. It is by no means a closed list:

General

- the desire of children in Canada to be reunited with their parents;[455]
- the strength of the relationship between the applicant(s) and the sponsor;[456]
- the situation of the sponsor in Canada and whether the applicant could help him or her in carrying out their daily activities (for ex. to babysit the children while the sponsor goes to work);[457]
- the past conduct of the sponsor (for example, the fact that the sponsor has been on social assistance);[458]
- the situation of the applicants abroad;[459]
- whether the applicant is alone in his or her country;[460]
- whether the parties to the application owe duties to one another based on their cultural background;[461]
- whether in the cultural background of the applicant(s) it is important for aging parents to live out their lives close to their children;[462]

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[455] ***Wong, Philip Sai Chak* v. *M.E.I.* (IAD T91-05637), Chu, Fatsis, Ahara, November 5, 1992.**

[456] ***Ibid.***

[457] ***Jean, Marie Béatrice* v. *M.E.I.* (IAD M93-05594), Durand, September 9, 1993.**

[458] ***Lai, supra*** note 418 at p. 30.

[459] ***Dutt, supra*** note 453.

[460] ***Baldwin, Ellen* v. *M.E.I.* (IAD T91-01664), Chu, Arpin, Fatsis, June 30, 1992.**

[461] ***Sotoodeh, supra*** note 441.

Medical inadmissibility

- whether there is evidence of an improved medical condition at the time of the appeal on compassionate or humanitarian considerations;[463]
- whether there are likely to be inordinate demands on Canadian services (medical/social);[464]
- the relative availability of health services to the applicants, in Canada and abroad;[465]
- the availability of a strong family support in Canada;[466]

Criminal inadmissibility

- whether there is evidence of rehabilitation.[467]

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[462] *Wong, supra* note 455.

[463] *Hui, supra* note 432 at p. 23.

[464] *Dutt, supra* note 453.

[465] *Ibid*.

[466] *Luong, supra* note 418 at p. 9.

[467] *Perry* v. *M.C.I.* (IAD V94-01575), Ho, November 1, 1995.

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CHAPTER 10

9. VISA OFFICERS AND THE DUTY OF FAIRNESS

9.1. Introduction

There is, as a general common law principle, a duty of procedural fairness resting on every public authority making an administrative decision which affects the rights, privileges or interests of an individual.[468] The content of the duty of fairness in application to individual cases will vary according to the circumstances of each case. In the final analysis, the simple question to be answered is: Did the decision-maker, on the facts of the particular case, act fairly toward the person claiming to be aggrieved?[469]

Because visa officers are immigration officers stationed outside Canada, and both visa and immigration officers fulfil similar functions, visa officers' and immigration officers' decision-making is examined in this chapter in order to illustrate fairness principles.

9.2. Content Of The Duty Of Fairness

9.2.1. Generally

Much of the Federal Court jurisprudence on the subject of procedural fairness deals with immigration officers' decisions on applications for exemption from section 9(1) of the *Immigration Act* (which requires an application for landing to be made outside Canada). The immigration officer makes a discretionary decision to allow or deny the request for exemption.

Where an immigration officer considering an application for exemption does not err in law or proceed on some wrong or improper principle, acts with an open mind without unduly fettering her discretion and gives the applicant an opportunity to respond to any concerns with respect to the application, the officer has discharged her duty fairly.[470] This statement accurately reflects the general duty of procedural fairness which governs visa officers in their processing of sponsored applications for landing.

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[468] *Cardinal v. Director of Kent Institution,* [1985] 2 S.C.R. 643.

[469] *Martineau v. Matsqui Institution Disciplinary Board,* [1980] 1 S.C.R. 602 at 631.

[470] *Hunter-Freeth, Eileen v. M.C.I.* (F.C.T.D., no. IMM-1795-95), Nadon, February 7, 1996. **The requirements of fairness in processing requests for exemption have been characterized as minimal:** *Shah, Syed v. M.E.I.* (F.C.A., no. A-617-92), Hugessen, MacGuigan, Linden, June 24, 1994.

9.2.2. Conflicting Statements at the Interview

A visa officer has a duty to clear up a direct conflict in two statements sworn by an applicant on the same day regarding his intention to reside permanently in Canada.[471] This obligation was established in ***Pangli***, where the Court invoked the *Canadian Bill of Rights* to afford the sponsor a fair hearing in accordance with the principles of fundamental justice. Visa officers' refusals have been found invalid by the IAD on facts identical to ***Pangli***.[472]

9.2.3. Use of Extrinsic Evidence

Extrinsic evidence means evidence of which the applicant is unaware because it comes from an outside source.[473] The Court has held that an immigration officer owes a duty of fairness to an applicant to provide an opportunity to comment upon extrinsic evidence, in this case, evidence about medical services available in El Salvador.[474] In the same context, the Federal Court of Appeal has outlined the officer's obligations in these terms:

> The officer is not required to put before the applicant any tentative conclusions she may be drawing from the material before her, not even as to apparent contradictions that concern her. Of course, if she is going to rely on extrinsic evidence, not brought forward by the applicant, she must give him a chance to respond to such evidence.[475]

Information obtained from a spouse in a separate spousal interview cannot be regarded as extrinsic evidence to which the applicant must be afforded an opportunity to respond.[476] Therefore, the officer is entitled to take any discrepancies in the spouses' accounts into consideration, without putting the discrepancies to the spouses for an explanation.

In an appeal from the refusal of his wife's application, the sponsor argued that the contradictions between his and his wife's evidence should have been put to his wife at the interview before the visa officer. The

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[471] *Pangli v. M.E.I.* (1987), 4 Imm.L.R.(2d) 266 (F.C.A.).

[472] **See:** *Rodriguez, Meliton v. M.E.I.* (IAD T91-00107), Weisdorf, August 8, 1991; *Merius, Ronald v. M.E.I.* (IAD M93-05810), Angé, June 13, 1994; *Biney, Alexander v. M.C.I.* (IAD M93-10425), Angé, September 27, 1994; **and** *Kaura, Surinder Kaur v. M.E.I.* (IAD M92-10114), Blumer, February 1, 1994.

[473] *Dasent, Maria Jackie v. M.C.I.* (F.C.T.D., no. IMM-5386-93), Rothstein, December 8, 1994.

[474] *Lovo, Julio Machado v. M.C.I.* (F.C.T.D., no. IMM-2694-94), MacKay, September 22, 1995.

[475] *Shah, supra* **footnote 470, at page 2.**

[476] *M.C.I. v. Dasent, Maria Jackie* (F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996.

IAD concluded that procedural fairness did not require an opportunity to respond to discrepancies from spousal interviews.[477]

9.2.4. Informing Applicant of Opportunity to Demonstrate Rehabilitation

The most recent caselaw decided before Bill C-44 (S.C. 1995, c.15) amendments to the *Immigration Act* did not impose any obligation on the visa officer to inform an applicant of the opportunity to demonstrate rehabilitation before refusing an application under the criminal inadmissibility provisions of the *Act*. A visa officer was not obliged to await the outcome of an applicant's request to the Governor in Council to show rehabilitation.[478] The only responsibility of the visa officer was to ascertain that there was no certificate of rehabilitation on the applicant's file.[479]

Under Bill C-44, the Minister decides on rehabilitation in all cases and the Governor in Council is no longer involved. Since the Minister now makes the decision on rehabilitation, a duty on the part of the visa officer to inform an applicant of this avenue of redress may emerge.[480]

9.2.5. Delay, Legitimate Expectations, Estoppel

The Federal Court Trial Division has held that fairness requires that an applicant receive a timely decision. What that means will vary with the circumstances of each case. The Court held in ***Gurmit Singh***[481] that the 2 1/2 year delay between the interview and notification of the decision was unacceptable where there were no special circumstances which accounted for the delay. For this and other reasons, the visa officer's decision was set aside.

Board decisions have recognized that the duty to act fairly includes a duty to proceed within a reasonable time.[482] Relief has been granted where administrative delays have had the effect of disqualifying an applicant.[483] But the caselaw is conflicting on this issue. An earlier case held that delay in the processing of an application for permanent residence is not such procedural unfairness as to render a visa officer's decision a nullity.[484] And as held in ***Gill***:

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[477] *Dhaliwal, Gurpal Singh v. M.E.I.* (IAD V92-01211), Wlodyka, July 22, 1993.

[478] *Symmonds, Lorraine Shirley v. M.E.I.* (IAD V91-00440), MacLeod, Wlodyka, Verma, February 25, 1992.

[479] *Dhaliwal, Jagdish Kaur v. M.E.I.* (IAD V91-01669), MacLeod, Wlodyka, Singh, March 29, 1993; **relying on** *Gill, Hardeep Kaur v. M.E.I.* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991. **See also** *Wong, Yuen-Lun v. M.C.I.* (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995.

[480] **Bill C-44 amended section 121 of the *Act* to allow the Minister to delegate the decision-making authority on rehabilitation.**

[481] *Singh, Gurmit v. M.C.I.* (F.C.T.D., no. IMM-4962-94), Simpson, December 21, 1995.

[482] *Jones, Violet Eugenia v. M.E.I.* (IAB 87-10538), Sherman, Weisdorf, Rotman, March 28, 1988.

[483] *M.E.I. v. Porter, Kathleen* (F.C.A., no. A-353-87), Hugessen, April 14, 1988; *Chaudhari v. M.E.I.* (1988), 5 Imm.L.R.(2d) 177 (IAB); *Persaud, Cyril v. M.E.I.* (IAD T92-00690), Arpin, Goodspeed, Rayburn, April 20, 1993.

> This is not, however, to say that the Government can, by simple inaction, defeat rights which were clearly intended to be granted. It may well be that the recently discovered administrative duty to act fairly encompasses a duty not unreasonably to delay to act; or, put positively, that the procedural duty to act fairly includes a duty to proceed within a reasonable time. It does not by any means follow, however, that the breach of such a duty would give rise to the setting aside of the tardy action when it is finally taken. The remedy surely is to compel timely action rather than to annul one that, though untimely, may otherwise be correct.[485]

The doctrine of legitimate expectations is invoked occasionally. The doctrine means that if a public body expressly or impliedly undertakes to follow a certain procedure, they may be held to their undertaking. The doctrine of legitimate expectations has been applied to require the Minister to consider a refugee claim after the person had been promised such consideration.[486] However, the doctrine has limited application. It is restricted to procedural matters and cannot be used to override a statutory requirement.

The doctrine of legitimate expectations was raised unsuccessfully in ***Lidder.***[487] In the particular case, at the time a second letter was sent to the applicant, the visa officer knew he was overage and still pursued the matter, raising expectations that the application could proceed. However, the Court held the doctrine to be procedural only. The visa officer could not be required to act in contravention of his statutory duty, and the requirement as to the age of the applicant was mandatory and absent of any discretionary power.

In ***Bakkeskaug***,[488] the Court found nothing to support the applicant's contention that the examining physician had acted as an agent of the Minister and the Minister had made promises to the applicant. The doctor's representations to the applicant, that his son's illness was not serious and everything would be fine, were gratuitous comments that could not give rise to the creation of substantive rights. In the same case, the applicant submitted that the decision to refuse his application was rendered prematurely without waiting until the treatment was complete. The Court distinguished ***Fung***[489] where, having told the applicant to take certain steps in relation to his tuberculosis, the authorities were obliged to allow those steps to be completed before assessing the application. In ***Bakkeskaug***, no instructions were given regarding a suggested program of treatment.

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[484] *Kaushal, Sushma Kumari v. M.E.I.* (IAB 86-9045), Eglington, Warrington, Rotman, March 27, 1987.

[485] *Gill v. M.E.I.*, [1984] 2 F.C. 1025 (C.A.) **at pages 1028-1029.**

[486] *M.E.I. v. Bendahmane, Mokhtar* (F.C.A., no. A-84-87), Hugessen, Desjardins, Marceau, April 10, 1989.

[487] *M.E.I. v. Lidder, Mohinder Singh* (F.C.A., no. A-1125-87), Desjardins, Décary, Marceau, March 10, 1992.

[488] *Bakkeskaug, Terje v. M.E.I.* (F.C.T.D., no. T-1837-91), Rouleau, September 25, 1991.

[489] *Fung, Gun Sui v. M.E.I.* (F.C.T.D., no. T-1472-85), Jerome, April 3, 1986.

9.2.6. Bias

If a reasonable apprehension of bias is made out, it is impossible to have had a fair hearing. The hearing and any subsequent decision are void.[490]

There was no apprehension of bias where an immigration officer had dealt with an applicant on two separate occasions in respect of two different matters, once after the applicant was arrested for not reporting and again at an interview regarding a sponsorship application.[491] Greater care must be taken where both matters in issue are the same and involve final decisions.[492]

Bad faith, abuse of discretion or improper conduct on the part of an officer will lead the Court to quash the officer's decision.[493] However, questioning applicants in a cold manner and accusing them of living from the government's money was not sufficient to make out a reasonable apprehension of bias against the visa officer.[494]

9.2.7. He Who Decides Must Hear

It is a denial of a sponsor's right to be afforded a fair hearing in accordance with the principles of fundamental justice if one officer interviews the applicant and a different officer refuses the application.[495] Where the interviewing officer was not the one to sign the refusal letter, yet the officer who did refuse did not simply accept the interviewing officer's recommendation but made an independent decision based on the evidence, there was no breach.[496]

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[490] *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992), 89 D.L.R.(4th) 289 (S.C.C.).

[491] *Idemudia v. M.E.I.* (1993), 19 Imm.L.R.(2d) 267 (F.C.T.D.).

[492] *Arthur, Gertrude v. M.E.I.* (F.C.A., no. A-991-90), MacGuigan, Linden, Gray, November 2, 1992.

[493] *So, King-Sing v. M.E.I.* (F.C.T.D., no. IMM-7542-93), Rouleau, March 22, 1995.

[494] *Khakoo, Gulshan M. v. M.C.I.* (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995. **In another case, the language used by the officer suggesting he was angered and frustrated by the applicant's status as a welfare recipient was held to raise a reasonable apprehension of bias:** *Manikkavasagar, Gnanamurthy v. M.C.I.* (F.C.T.D., no. IMM-1454-94), Simpson, December 14, 1995.

[495] *Pangli, supra* **footnote 471; followed in** *Dhaliwal, Balwinder Kaur v. M.E.I.* (IAD V91-01893), Wlodyka, Gillanders, Verma, January 7, 1993; *Pierre-Paul, Jean-Pierre v. M.C.I.* (IAD M93-09745), Durand, July 14, 1994; **and the appeal allowed as a result.**

[496] *Brar, Pritam Singh v. M.E.I.* (IAD V92-00108), Verma, Wlodyka, Gillanders, July 14, 1993.

9.2.8. Knowing Case to be Met and Opportunity to Respond

In ***Muliadi,***[497] the Court of Appeal held that a visa officer's decision which was based on material which had not been presented to the applicant, and which he had not been given an opportunity to refute, was procedurally unfair. As a general proposition, a visa officer must provide an applicant with an opportunity to refute evidence in the officer's possession which is relied on by the officer in denying a visa.[498]

Procedural due process had not been accorded where the officer did not afford the sponsor the opportunity to address the question of whether or not the small shortfall in financial requirements reflected an accurate measurement of likelihood of successful establishment.[499]

The applicants in ***Khakoo***[500] argued they had been ambushed at their interview and should have been given specific notice of the officer's concerns regarding their long reliance on social assistance and their capacity to maintain themselves without resort to social assistance. The Court held the onus was on the applicants under section 8(1) of the *Act.* They were aware that social assistance was potentially a source of concern and they should have been prepared to deal with it at the interview without special notice. There was no onus on the visa officer to notify the applicants of her concern in advance.

It was a breach of fairness for a visa officer not to have notified the applicant of the results of a field investigation so as to allow the applicant an opportunity to contradict or explain it.[501] It would have been consistent with the duty of fairness for a visa officer to have cleared up contradictions between information in an applicant's birth certificate and application for permanent residence and between those documents and statements given at the interview.[502]

There was a clear denial of fairness when a visa officer decided an applicant's case before the applicant was given an opportunity to supply documentary evidence requested by the officer.[503]

In one case, the Court held that the duty of fairness did not oblige the immigration officer to communicate relevant medical information to the applicants before his decision was made.[504] However, in a more recent decision, the Court recognized the immigration officer's failure to act fairly, as the applicant was not given a fair opportunity to make submissions before the decision to refuse his son on medical grounds.[505]

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[497] *Muliadi v. M.E.I.,* [1986] 2 F.C. 205 (C.A.).

[498] *Gill, Jhanda Singh v. M.E.I.* (F.C.T.D., no. T-501-90), Jerome, March 20, 1990.

[499] *Gill, Paramjit Kaur v. S.S.C.* (IAD T93-09697), Hopkins, August 25, 1994.

[500] *Khakoo, supra* **footnote 494.**

[501] *Dhillon, Karam Singh v. M.E.I.* (IAD V91-00881), Wlodyka, Gillanders, Verma, October 23, 1992.

[502] *Basi, Sukhdev Kaur v. M.E.I.* (IAD V87-6043), Mawani, Chambers, Gillanders, March 20, 1989.

[503] *M.E.I. v. Yang, Li* (F.C.A., no. A-169-89), Mahoney, Urie, Stone, May 22, 1990.

[504] *Stefanska, Alicja Tunikowska v. M.E.I.* (F.C.T.D., no. T-1738-87), Pinard, February 17, 1988; **relied on in** *Ling, Simeon Tsan En v. M.E.I.* (IAD T91-00173), Tisshaw, Weisdorf, Chu, September 26, 1991; **see also** *Takhar, Manjit Singh v. M.E.I.* (IAD V90-00588), Wlodyka, Chambers, Verma, March 4, 1991.

Relying on ***Gao***, the IAD held there should have been an opportunity for the appellant to counter the negative medical opinion. The refusal was not valid in law, among other reasons, as a result of breach of fairness of the visa officer.[506] In another case, the IAD distinguished ***Gao***. The panel did not interpret ***Gao*** to stand for the proposition that a visa officer must always give an applicant or sponsor an opportunity to rebut a negative medical report before making a decision that an applicant is inadmissible on medical grounds. Here, the immigration officials did not have two contradictory medical assessments before them. When the Court held that the duty of fairness was not met in ***Gao***, it based that finding specifically on the particular circumstances of the case.[507]

The visa officer requested documents verifying the formal validity of a marriage and received them. However, it was specifically the issue of "garlanding" which was her concern and to which, because it was not raised, the applicant had not responded. The officer had not allowed the applicant to fully respond or provide an explanation. The officer breached her duty of fairness and the appeal was allowed as a result.[508]

In ***Chungh***, the IAB was concerned there had been no second interview following the request for re-evaluation of financial circumstances. The appellant was unaware of a telex, which could have adversely affected the sponsorship, until she received the record for appeal. There was no opportunity to provide additional evidence or an explanation. This omission by itself could be considered a breach of fairness and constitute a basis for allowing the appeal.[509]

Again, the visa officer breached his duty of procedural fairness by failing to afford the applicant an opportunity to clarify his suspicion, relied on as a ground of refusal, either at an interview or with further documentation.[510]

Where a refusal of an application on the ground that the applicants were not immigrants was upheld on appeal and a second application was refused on the same ground, the visa officer was not precluded from considering the applicant's intentions at the time of the first application but it was also incumbent on him to consider their present intentions and in fairness give them the opportunity to explain any change in intention.[511]

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[505] *Gao v. M.E.I.* (1993), 18 Imm.L.R.(2d) 306 (F.C.T.D.).

[506] *Cheung, Kang Por v. M.E.I.* (IAD W92-00161), Rayburn, October 21, 1993.

[507] *Basi, Kuldip v. M.E.I.* (IAD V93-00323), Ho, Verma, Clark, August 2, 1994.

[508] *Kaushik, Uma v. M.C.I.* (IAD W94-00003), Wiebe, October 18, 1994. **See also** *Dhalla, Sudesh Kumari v. M.C.I.* (IAD W93-00076), Wiebe, September 9, 1994, **where, after holding the refusal invalid (on the same basis as *Kaushik*), the IAD went on to determine whether the applicants were members of the family class, and found they were.**

[509] *Chungh, Kulvinder Kaur v. M.E.I.* (IAB V87-6154), MacLeod, Mawani, Wlodyka, May 23, 1988.

[510] *Sangara, Gurnam Singh v. M.E.I.* (IAB 86-6111), Gillanders, Mawani, Wlodyka, May 20, 1987.

However, it could not be said that there was a breach of procedural fairness where the applicants knew the substance of the allegations against them at the time they were interviewed.[512]

9.2.9. Interpretation at the Interview

Lack of adequate interpretation was held to constitute a breach of fairness.[513] The interviewing visa officer may also act as interpreter.[514]

9.2.10. Other Procedural Matters

In ***Tham***,[515] the refusal letter had been issued before the interview with the applicant. The refusal letter was found to be premature and unfair. The IAB allowed the appeal and was upheld by the Federal Court of Appeal. The Federal Court held that the refusal was premature and a breach of the duty of fairness implicit in the *Act* and *Regulations*. ***Tham*** was followed in ***Chahal***[516] and the visa officer's issuance of an anticipatory refusal was held to be in breach of his duty of fairness.

No reasons, formal or internal, indicating the rationale for the officer's decision are required for a discretionary decision under section 114(2) of the *Act* for landing from within Canada on humanitarian and compassionate grounds.[517]

There is no obligation in a section 114(2) decision to conduct an interview, but once the Department agreed to the interview, they had to conduct it fairly.[518] In a case involving a medical refusal of the sponsor's father, the applicants (mother and father) had not been interviewed. The IAD did not decide the issue but gave an indication that an interview was not a necessary component of procedural fairness.[519]

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[511] *Ahmed, Mohammed Altaf v. M.E.I.* (IAB 84-9485), D. Davey, Suppa, Hlady, May 29, 1985.

[512] *Jassal, Surinder Singh v. M.E.I.* (IAD V91-01400), Gillanders, Wlodyka, Verma, March 7, 1993 **(the allegations being a sister's marriage and birth of a child).**

[513] *Mistry, Ratilal v. M.E.I.* (IAD T93-09237), Bell, February 25, 1994.

[514] *Khan, Sajida Rehman v. M.E.I.* (IAB 86-10,055), Eglington, Jew, Warrington, August 18, 1987.

[515] *M.E.I. v. Tham, Aurora Kok* (F.C.A., no. A-756-86), Hugessen, Marceau, Urie, September 19, 1986.

[516] *Chahal, Baljit Singh v. M.E.I.* (IAD V88-00148), Singh, Wlodyka, Gillanders, May 17, 1989.

[517] *Hunter-Freeth, supra* **footnote 470.**

[518] *Kaur v. M.E.I.* (1987), 5 Imm.L.R. (2d) 148 (F.C.T.D.).

[519] *Atwal, Lakhbir Kaur v. M.E.I.* (IAD V88-00152), MacLeod, Singh, Chambers, May 12, 1989. **See also** *Dhalla, supra* **footnote 471, to the same effect.**

9.3. Remedies for Breach of Fairness

9.3.1. Jurisdictional Questions

In ***Gordon***[520] the IAD found a breach of fairness but held it could not take jurisdiction to consider the unfairness without first determining if the applicant was a member of the family class. In the panel's view, such determination was necessary before it could take jurisdiction. It was not able to determine the question of the applicant's membership in the family class and accordingly, held it had no further jurisdiction. The decisions of the Federal Court of Appeal in ***Porter,***[521] ***Pangli***[522] and ***Tham***[523] support the view that the IAD should take jurisdiction to address fairness issues. And ***Gordon*** was expressly not followed in ***Dhaliwal***.[524]

In terms of the jurisdiction of the IAD to cure procedural defects, ***Kaushal***[525] holds that the IAD has no powers equivalent to *certiorari* to quash for excess of jurisdiction but can conclude there has been such unfairness as to render a visa officer's decision a nullity.

9.3.2. Options

Where there was a ***Pangli***-type breach (interviewing officer did not refuse) the IAD did not consider it appropriate to hear the appeal on its merits. There had been a denial of the sponsor's right to be afforded a fair hearing in accordance with the principles of fundamental justice. The denial of natural justice vitiated the whole proceeding, and according to ***Chandler,***[526] a tribunal is bound to start afresh in order to cure the defect in such circumstances.[527] It cannot be cured by a *de novo* hearing before the IAD. The IAD relied on ***Newfoundland Telephone Co. Ltd.***,[528] in which the conduct of a tribunal member created an apprehension of bias which rendered the decision void, not voidable. This position has been taken consistently since ***Pangli***.[529]

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[520] *Gordon, Ervin Reginald v. M.E.I.* (IAD V89-00809), Chambers, Gillanders, MacLeod, June 25, 1990.

[521] *Porter, supra* **footnote 483.**

[522] *Pangli, supra* **footnote 471.**

[523] *Tham, supra* **footnote 515.**

[524] *Dhaliwal, Balwinder Kaur, supra* **footnote 495.**

[525] *Kaushal, supra* **footnote 484.**

[526] *Chandler et al. v. Alberta Association of Architects et al.* (1989), 40 Admin.L.R. 128 (S.C.C.).

[527] *Dhaliwal, Balwinder Kaur, supra* **footnote 495.**

[528] *Newfoundland Telephone, supra* **footnote 490.**

[529] *Muli, Surinderpal Singh v. M.E.I.* (IAD V92-01376), Wlodyka, December 2, 1993.

Therefore, in the event of a breach of the type before the Court in ***Pangli,***[530] (i.e., the interviewing officer not being the deciding officer or there being a conflict in two statements sworn the same day by the applicant), the IAD has followed ***Pangli*** and allowed the appeal.

However, as a general rule, where there has been a denial of fairness in the sponsorship process, the cases seem to favour the *de novo* approach.[531] The appeal hearing before the IAD is a *de novo* hearing in a broad sense and the appeal is decided on all the evidence adduced at the hearing and on the facts as they exist at the time. Hence, the caselaw concludes that procedural unfairness which may have occurred at an earlier stage in the processing of an application can be cured through the IAD full hearing process.

In some instances, the IAD has given evidence which is "tainted" by unfairness little weight or no weight.

In ***Gill,***[532] relying on ***Kahlon,***[533] the IAD decided the appeal on the evidence notwithstanding its finding of breach of procedural due process on the part of the immigration officer's financial assessment of the sponsor. In another case, the IAD was satisfied that even if there had been a breach of fairness, the sponsor had not been prejudiced. She had every opportunity to present her case and satisfy the IAD at the hearing as to the conflicting evidence regarding the identity of her sister.[534]

In ***Atwal,***[535] the alleged breach was that the applicant and his wife were not interviewed by the visa officer. Although it was not decided if the lack of an interview was a denial of fairness, the appeal hearing was held to cure any procedural defect. Similarly, on a motion by the sponsor that there had been a breach of procedural fairness due to lack of proper interpretation during the applicant's interview with the visa officer, the IAD held that the *de novo* hearing would cure the procedural defect alleged and the sponsor would have an opportunity to respond to the allegedly tainted evidence.[536]

In ***Mistry***[537] the *de novo* approach was adopted where the interview had been unfair due to inadequate interpretation. The applicants, who spoke Punjabi, had been refused a Punjabi interpreter. The panel stated it could have found the refusal invalid based on the breach, but it applied ***Kahlon*** to decide the case on its merits. The panel excluded the evidence in the visa officer's statutory declaration and notes and relied on the other evidence in the record and the evidence adduced at the hearing, ultimately dismissing the appeal.

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[530] *Pangli, supra* **footnote 471.**

[531] *S.G.C. v. Dhillon, Karam Singh* (F.C.T.D., no. A-88-93), Rouleau, August 25, 1993; **rev'g** *Dhillon, supra* **footnote 501.**

[532] *Gill, Paramjit Kaur, supra* **footnote 499.**

[533] *Kahlon v. M.E.I.* (1989), 7 Imm.L.R.(2d) 91 (F.C.A.).

[534] *Basi, Sukhdev Kaur, supra* **footnote 502. See also** *Jassal, supra* **footnote 512, where the IAD remarked on the sponsor's possession of the appeal record months before the hearing, clearly making him aware of the case to be met.**

[535] *Atwal, supra* **footnote 519.**

[536] *Gill, Samarjit Kaur v. M.E.I.* (IAD V93-00023), Singh, Clark, Ho, August 24, 1994.

[537] *Mistry, supra* **footnote 513.**

Having concluded that procedural fairness required the officer to ask for an explanation of the discrepancies between the facts set out in a deed and the natural parents' statements, the IAD gave no weight to the evidence declared to by the interviewing officer concerning the information provided by the natural parents. In addition, the *de novo* hearing allowed the sponsor to show that the requirements of the *Act* and *Regulations* were met at the relevant time.[538]

The introduction of evidence at the hearing that the Governor in Council had determined the applicant was rehabilitated could have remedied any procedural unfairness in relation to this issue which may have occurred during the visa officer's processing of the application.[539]

Less frequently, the IAD has allowed an appeal once satisfied that some unfairness occurred.[540] This approach finds support in decisions such as ***Tham***.[541] In ***Tham***, the Court upheld the IAB's decision allowing the appeal as a result of the unfairness and went on to order the reprocessing of the sponsored application to accord the applicant the fairness to which he was entitled.

An application for judicial review under section 82.1(2) of the *Act* may be pursued as a remedy to quash a visa officer's decision for procedural unfairness. Such an application would not preclude a concurrent appeal to the IAD from the same decision of the visa officer.[542]

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[538] *Samra, Avtar Kaur v. M.E.I.* (IAD V90-01073), Tisshaw, Wlodyka, Chu, September 23, 1991.

[539] *Symmonds, supra* **footnote 478;** *Dhaliwal, Jagdish Kaur, supra* **footnote 479.**

[540] *Kaushik, supra* **footnote 508;** *Dhalla, supra* **footnote 508. In exceptional circumstances, where the result will be inevitable and the remedy sought is impractical or non-sensical, the Court may overlook the usual rule that the apparent futility of a remedy will not bar its recognition and may withhold the discretionary remedy:** *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

[541] *Tham, Aurora Kok v. M.E.I.* (IAB 83-6793), Suppa, Benedetti, Hlady, May 24, 1985; **aff'd in** *Tham, supra* **footnote 515.**

[542] *Khakoo, supra* **footnote 494.**

CHAPTER 10

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